6/19/92

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 16 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BILLY L. THOMAS and LILA L. THOMAS, husband and wife; COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Pawnee County, Oklahoma,

Defendants.

CIVIL ACTION NO. 90-C-0067-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 16th day of June, 1992, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Small Business Administration, for leave to enter a Deficiency Judgment. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendants, Billy L. Thomas and Lila L. Thomas, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed to Billy L. Thomas and Lila L. Thomas, Route 1, Box 3791, Jennings, Oklahoma 74038, and all counsel and parties of record.

The Court further finds that the amount of the Judgment rendered on August 28, 1990, in favor of the Plaintiff United States of America, and against the Defendants, Billy L. Thomas

and Lila L. Thomas, with interest and costs to date of sale is $67,296.35.

The Court further finds that the appraised value of the real property at the time of sale was $5,985.36.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered August 28, 1990, for the sum of $4,851.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on the 4th day of October, 1991.

The Court further finds that the Plaintiff, United States of America on behalf of the Small Business Administration, is accordingly entitled to a deficiency judgment against the Defendants, Billy L. Thomas and Lila L. Thomas, as follows:

Principal Balance as of 8/28/90		$55,023.68
Interest		12,102.67
Abstracting		170.00
TOTAL		$67,296.35
Less Credit of Appraised Value	-	5,985.36
DEFICIENCY		$61,310.99

plus interest on said deficiency judgment at the legal rate of 4.26 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Small Business Administration have and recover from Defendants, Billy L. Thomas and Lila L. Thomas, a deficiency judgment in the amount of $61,310.99, plus interest at the legal rate of 4.26 percent per annum on said deficiency judgment from date of judgment until paid.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PB/css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BANK OF OKLAHOMA, NATIONAL ASSOCIATION, a national banking association, in its capacity as Trustee of the Cleveland County Home Loan Authority,

Plaintiff,

vs.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, a Connecticut corporation,

Defendant.

No. 91-C-337-E

O R D E R

On May 7, 1992, this Court heard testimony on Plaintiff's application for attorney's fees. The parties stipulated to an hourly rate, subject to this Court's ruling on the availability of attorney fees under the terms and provisions of the bond. The parties were invited to supplement the record on that issue. The Court has reviewed the supplementary submissions of the parties and has studied the language of the bond in light of the applicable law. The Court finds that the appropriate interpretation of the language of the bond permits an award of attorney's fees as prayed for by Bank of Oklahoma. Wherefore, Plaintiff Bank of Oklahoma's application for attorney's fees should be granted.

So ORDERED this 17th day of June, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HERBERT HILL,

Plaintiff,

v.

GARY D. MAYNARD, et al,

Defendants.

92-C-207-E

ORDER

Now before this Court is the Defendants' Motion To Dismiss for improper venue, and the Plaintiff's Motion For A Special Report. Plaintiff Herbert Hill filed a civil rights suit on March 9, 1992, alleging that he was denied access to legal materials by officials at the Oklahoma City Community Correctional Center.

The first issue is whether venue is proper. 28 U.S.C. §1391(b) states:

> **A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, excepts as otherwise provided by law, be brought only if (1) a jurisdiction where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.**

None of the Defendants reside in the Northern District of Oklahoma. In addition, the allegations involved in this complaint took place in the Oklahoma City Community Correctional Center.[1] Venue is not proper in the Northern District. However, instead of

[1] *The Oklahoma City Community Correctional Center is located in the Western District.*

dismissing the case, the case should be transferred to the District Court of the United States For the Western District of Oklahoma.

In addition, the Plaintiff's Motion For A Special Report will be **DENIED.** Once the case is transferred, the motion can be re-urged if necessary. This matter is ordered transferred to the United States District Court for the Western District of Oklahoma.

SO ORDERED THIS 17th day of June, 1992.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RHONDA L. WALLER, as Surviving Spouse of BOBBY RAY WALLER, JR., Deceased, Individually and on Behalf of HEATHER RAYLYNN WALLER and DAVID PAUL WALLER, Surviving Minor Children,

Plaintiffs,

v.

PULLMAN LEASING DIVISION of SIGNAL CAPITAL CORPORATION, a Wholly Owned Subsidiary of THE HENLEY GROUP, INC., a Foreign Corporation,

Defendant and Third-Party Plaintiff,

v.

ORTNER FREIGHTCAR CO., a Foreign Corporation, a Wholly Owned Subsidiary of Trinity Industries, Inc.,

Third-Party Defendant.

No. 89-C-473-B

ORDER TAXING COSTS

The Clerk after reviewing the Bill of Costs submitted by Third-Party Defendant, Ortner Freightcar Company, and after considering the Response thereto of Defendant and Third-Party Plaintiff, Pullman Leasing, and after otherwise being fully apprised:

FINDS that copy costs in the amount of $45.73 shall be allowed. The fees and expenses of transcripts, depositions, and

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witnesses are hereby disallowed as not being necessary for use by the court. Those costs identified as travel and expenses of attorneys are properly presented as attorney fees and as such the Clerk makes no finding.

Costs in the amount of $45.73 are hereby taxed against Pullman Leasing and in favor of Ortner Freightcar Company.

Richard M. Lawrence

Richard M. Lawrence, Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TERRY A. JENKINS,
Plaintiff,

v.

GREEN BAY PACKAGING, INC., et al.,

Defendants.

RICHARD E. LOHMANN,

Plaintiff,

v.
GREEN BAY PACKAGING, INC., et al.,

Defendants.

LARRY B. KUNS,

Plaintiff,

v.

GREEN BAY PACKAGING, INC., et al.,

Defendants.

Case No. 91-C-639-B
(Consolidated)

ORDER

The application of defendants Green Bay Packaging Inc.; Green Bay Packaging Inc. as Successor in Interest of Southwest Packaging, Inc.; Green Bay Packaging Inc. as Plan Administrator for the Retirement Plan for Office and Salaried Employees of Green Bay Packaging Inc. and Subsidiaries; the Retirement Plan for Office and Salaried

Employees of Green Bay Packaging Inc. and Subsidiaries; and R.P. Laster ("Green Bay Defendants") to amend the Motion for Summary Judgment, as set forth below, is granted.

Page 8, paragraph 17 is amended as follows:

Based on the best information available and computed as of the Plan's normal retirement age, the annual amount for a single life annuity for Lohmann based on his employment from March 1, 1987 to his termination of employment is ~~$1,766.97~~ $1,646.97.

Page 9, paragraph 18 is amended as follows:

Based on the best information available and computed as of the Plan's normal retirement age, the annual amount for a single life annuity for Jenkins, based on his employment from March 1, 1987 to his termination of employment is ~~$1,532.67~~ $1,472.67.

Page 9, paragaph 19 is amended as follows:

Based on the best information available and computed as of the Plan's normal retirement age, the annual amount for a single life annuity for Kuns, based on his employment from March 1, 1987 to his termination of employment is ~~$1,749.08~~ $1,629.08.

Page 11, first sentence of second full paragraph is amended as follows:

Based on the best information available and computed as of the Plan's normal retirement age, the annual amount of the retirement benefit due to Plaintiffs based on a

single-life annuity is ~~$1,332.97~~ $1,472.67 for Jenkins; ~~$1,766.97~~ $1,646.97 for Lohmann; and ~~$1,749.08~~ $1,629.08 for Kuns. It is so ordered.

Dated this 17th day of June, 1992.

S/ THOMAS R. BRETT

Thomas R. Brett
United States District Judge

210.92A.BAC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMOS EUGENE TAYLOR and BARBARA L. TAYLOR,

Plaintiffs,

v.

CHUBB GROUP OF INSURANCE COMPANIES and NORTHWESTERN PACIFIC INDEMNITY COMPANY,

Defendants.

Case No. 90-C-762-E

JUDGMENT

Pursuant to the jury verdict returned on June 2, 1992, the Court enters this Judgment as required by Rule 58 of the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That Plaintiffs are entitled to judgment in their favor on their contract claims for the residence in the amount of $214,266.90.

2. That Plaintiffs are entitled to judgment in their favor on their claims for negligent infliction of emotional distress in the amount of $600,000.00.

3. That the Defendants are entitled to judgment in their favor on Plaintiffs' claim for bad faith.

The Judgment is so entered this 16th day of June, 1992.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

Taylor.Jdg

entered

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAFECO INSURANCE COMPANY OF AMERICA,

Plaintiff,

AND

THE AETNA CASUALTY AND SURETY COMPANY,

Intervenor,

vs.

WILLIAM A. SANDERS, et al.,

Defendants.

No. 88-C-189-E

FILED

JUN 18 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER AND JUDGMENT

This Order and Judgment is entered pursuant to issues raised by Defendants by motion filed on April 17, 1992. Defendants' motion asks the Court to reconsider or, in the alternative, to clarify its ruling of April 14, 1992 granting Plaintiff summary judgment.

The Court upon consideration of the briefs submitted, the arguments of counsel, and the answers of the Oklahoma Supreme Court to the certified questions, enters this Order.

Defendants urge an interpretation of the Oklahoma Supreme Court's answers to the certified questions which would create a separate consideration of the use of the automobile before and after the fuel line was cut. Defendants argue that the injuries suffered by Houghton and Sanders as a result of the acts of the tortfeasors prior to the cutting of the fuel line would be covered

by UMC. In short, Defendants urge that because the Supreme Court stated that the deaths of Houghton and Sanders were connected to the use of the automobile "it can only follow that the injuries sustained by Houghton and Sanders prior to death were also connected to the use of the automobile." Defendants fail to address the two-prong test established by the Oklahoma Court. The Court clearly stated that the requirement of Subsection B of Section 3636 (that the insured be legally entitled to recover damages from the owner or operator of an uninsured motor vehicle) implies an intent that there be a connection between the motoring or transportation use by an uninsured motorist and the injury to the insured. The test is (1) is a use of the vehicle connected to the injury; and (2) is that use related to the transportation nature of the vehicle. The Supreme Court of Oklahoma in applying the two-pronged test to the fact situation stipulated in this case stated:

> "... if the evidence establishes that acts of an uninsured motorist, which were not related to the transportation nature of the motor vehicle, resulted in the injury and that the transportation use of the vehicle did not contribute to the injury, then any casual connection between the transportation use of a motor vehicle and the injury is interrupted and severed ..."

The Court then stated:

> "Under the facts certified to this Court, the acts of cutting the fuel line and igniting the fuel after the car was parked, which caused the car to burn, are so contrary to its transportation nature of the vehicle that, as a matter of law, these events are not related to its transportation nature and injury resulting therefrom is not within the UM

coverage mandated by Section 3636."

Defendants rely on Willard v. Kelley, 803 P.2d 1124 (1990). Under the facts of Kelley, police officer Willard spotted a vehicle driven by a suspected armed robber, Mr. Kelley. Willard attempted to stop the Kelley vehicle and a chase ensued. Kelley's automobile collided with two other cars and came to a temporary halt. Willard's patrol car stopped behind Kelley's car. Willard drew his weapon as he stepped out beside his car. Several bullets fired by Kelley struck Willard. The trial court characterized the shooting as an accident which arose out of the gunman's use of the automobile and granted summary judgment to the insured. The Court of Appeals held that Kelley's vehicle was the casual relationship between Kelley's actions and Willard's injuries. The Supreme Court of Oklahoma found that the trial court and the Court of Appeals had erroneously concurred that there was no material fact remaining to be tried and the resolution of claim hinged solely on a question of law. The Kelley court rejected this position and stated that conflicting inferences may be drawn from the material facts placed before the trial court and hence summary judgment for the insured was improvidently granted. The Court stated that under the facts the jury might infer that the act of shooting was designed to facilitate Kelley's escape or impede Willard's pursuit.

In the instant case the Supreme Court of Oklahoma held that:

> "If the facts establish that a motor vehicle or any part of the motor vehicle is the dangerous instrument which starts the chain of events leading to the injury, the injury arises out of the use of the motor vehicle as contemplated by 36 O.S. 1981 §3636."

It is therefore a fair inference that when the Oklahoma Supreme Court imposed the "chain of events" test herein, it had before it only those issues. It is important to note that only the death issues were submitted by the parties' certified questions. Taking that fact and viewing it in light of the teaching of Kelley that conflicting inferences may be drawn from the material facts - the Court concludes that a reversal of its prior grant of summary judgment is appropriate.

If the test in Oklahoma were the "causal connection" test, the answer would be otherwise. (see Summers J., concurring).

It is therefore necessary that a jury address the two-pronged test which the Supreme Court of Oklahoma finds necessary to determine whether an injury is within the UM coverage contemplated by Section 3636.

Therefore Plaintiff's Motion for Summary Judgment is denied. The case is set for scheduling conference on the 25th day of June, 1992 at 1:30 o'clock p.m.

So ORDERED this 18th day of June, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. ANITA HEAD a/k/a ANITA FRAZIER and JERRY OWENS, Defendants.	Case No. 90-C-1014-B CONSOLIDATED
JERRY OWENS, Plaintiff, vs. ANITA FRAZIER, now ANITA HEAD, Defendant, and STATE FARM GENERAL INSURANCE COMPANY, Garnishee.	Case No. 91-C-90-B

J U D G M E N T

In accord with the Order filed herein on June 15th, 1992, sustaining State Farm's Motion To Tax Attorneys Fees As Costs[1] the Court hereby enters Judgment in favor of State Farm Mutual Automobile Insurance Company and against Jerry Owens in the amount

[1] An Amended Bill of Costs in favor of State Farm, in the amount of $401.60, was allowed by the Clerk of the Court on December 12, 1991.

of $7,476.00, plus interest thereon from this date at the rate of 4.26% per annum until paid.

DATED this 15 day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. ANITA HEAD a/k/a ANITA FRAZIER and JERRY OWENS, Defendants.	Case No. 90-C-1014-B CONSOLIDATED
JERRY OWENS, Plaintiff, vs. ANITA FRAZIER, now ANITA HEAD, Defendant, and STATE FARM GENERAL INSURANCE COMPANY, Garnishee.	Case No. 91-C-90-B

O R D E R

This matter comes on for consideration of Plaintiff State Farm Mutual Automobile Insurance Company's (State Farm) Motion To Tax Attorney's Fees As Costs, against Defendant Jerry Owens.

Prior hereto, on November 27, 1991, the Court entered its Order granting State Farm's Motion For Summary Judgment on its Declaratory Judgment Complaint and dismissing the related (consolidated) Garnishment Action as moot. The essential facts, as set forth in the Court's earlier Order are:

1. On February 16, 1982, Jerry Owens (Owens) was involved in

an automobile accident with Anita Frazier (Frazier, now Head). Frazier was driving a 1977 Chevrolet Silverado Pickup Truck owned by her then boyfriend and later husband, Leon Head.

2. On December 8, 1982, Owens sued Frazier for injuries related to the accident in Tulsa County District Court, CT82-1098. On December 9, 1982, Frazier was served with Summons.

3. On February 11, 1983, default judgment was rendered against Frazier for $263,876.65, including $2,126.65 medical bills, $6,750 lost wages, $5,000 future medical, $2,500 attorneys fees and $250,000 in pain and suffering.

4. Over six years later, Frazier appeared at an Asset Hearing in CT82-1098 on February 23, 1989. Frazier stated by affidavit that she did not contact State Farm about the accident or suit until she discussed it with a State Farm representative after the 1989 Asset Hearing. Tamara Poulton, Claim Superintendent for State Farm, stated by affidavit that State Farm did not receive notice of the accident or the state court suit until after the asset hearing in February 1989, having been notified by an investigator working on behalf of Owens who was seeking to determine if State Farm had any coverage for Frazier.

5. State Farm engaged attorneys, under a reservation of rights, to represent Frazier in attempting to set aside the default judgment entered in CT82-1098. On September 24, 1990, state Judge Boudreau issued Findings of Fact and Conclusions of Law in Tulsa County District Court Case No. CJ90-0686 in which he found that Frazier was (properly) served with Summons and that the judgment

entered in CT82-1098 should not be set aside or vacated.

7. On the date of the accident, State Farm had in force and effect a liability insurance policy, # 169-4817-D08-36 (Policy 4817), issued to Leon Head as named insured, listing a 1975 Chevrolet Pickup Truck as the described vehicle. The 1975 Chevrolet Pickup Truck had previously been stolen, and the 1977 Chevrolet Silverado Pickup Truck mentioned in paragraph 1 above had been purchased by Head as a replacement for the stolen 1975 vehicle.[1] The 1977 Pickup truck was a Newly Acquired Vehicle under Policy 4817.

8. Owens had also made claim under policy number 178-9055-F27-36 (Policy 9055). Policy 9055 was not in effect on February 16, 1982, the date of the accident. Also Policy 9055 covered a 1968 Chevrolet which was not involved in the subject accident.

9. State Farm had no policies in effect for Anita Frazier.

Under the record State Farm was not notified of the accident until February, 1989 (Leon Head's affidavit, offered by State Farm, failed to reflect that any notification to State Farm occurring prior to February, 1989). The lack of notification to State Farm was also established in the affidavit of Tamara Poulton.

The lack of notification to State Farm earlier than in February, 1989, was in the Court's view, the most critical fact.

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[1] The Court noted that in the affidavit of Leon Head the following appears: "4. On February 24, 1982 I requested State Farm to substitute the 1977 Pickup for the 1975 Pickup on policy No. 169 4817 D08 36." What did *not* appear in Head's affidavit was any statement that he notified State Farm of the accident involving the 1977 Pickup which had occurred 8 days earlier.

Owens was required to do more, to survive a motion for summary judgment, than merely suggest a genuine dispute exists as to whether either Head, Frazier or anyone advised State Farm of the fact of such accident and related litigation prior to the time Frazier acknowledges having informed State Farm of such fact.

In Oklahoma, the statute of limitations on an action begins to run when the cause of action accrues, and an accrual occurs when the claimant first could have maintained his action to a successful conclusion. **Matter of Estate of Crowl**, 737 P.2d 911 (Ok. 1987).

The Court concluded that any cause of action under the insurance contract on the 1977 vehicle would have first accrued when Owens secured his judgment against Frazier on February 11, 1983. The Court further concluded that such right of action was controlled by 12 O.S. §95, the limitations statute dealing with written contracts, which provides that an action must be commenced within five years from the time the cause of action accrues. **Matter of Estate of Crowl**, *737 P.2d 911 (OK.1987)*, not done in this case. Therefore, any action which could have been maintained under Policy 4817 must have been filed by February 11, 1988, which was not done, thereby barring any claim under the Policy.

The Court concluded State Farm was not given proper and timely notice of either the accident or the litigation resulting in a judgment against Frazier, which notice was due State Farm under the policy in issue. This lack of notice prevented, in the Court's view, the imposition of liability under the Policy on the facts established.

Thereafter State Farm filed its Motion To Tax Attorney's Fees As Costs, citing as authority therefore 36 O.S. § 3629 B, 28 U.S.C. § 2202 and 12 O.S. § 1190. The archetypical authority for attorneys fees in Oklahoma, 12 O.S. § 936, was cited by neither party.

36 O.S. § 3629 B provides, in part, as follows:

> **§ 3629. Forms of proof of loss; offer of settlement or rejection of claim.**
>
> * * *
>
> B. It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party.

The 1977 amendment, Laws 1977, c. 133, § 1. eff. Oct. 1, 1977, added subsection B, which several federal courts have concluded runs afoul of the Oklahoma Constitution. **Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins.**, 550 F.Supp. 710 (D.C.W.D.OK-1981), held:

> "As to Plaintiff's claim for an attorney fee based upon 36 Okla.Stat.Supp. 1977 § 3629 B, said statute as it relates to providing for an attorney fee has been declared in violation of the Oklahoma Constitution by Judge Ralph G. Thompson of this Court. *First National Bank and Trust Company of El Reno v. Transamerica Insurance Company*, CIV-79-1358-T (W.D.Okl. October 9, 1981). Judge Thompson found that § 3629 B did not mention attorney fees in the title to the Act as required by Art. 5, § 57 of the Oklahoma Constitution and for such reason said statute contravenes the Oklahoma Constitution as to the provision for an attorney fee. Judge Thompson's analysis of Oklahoma law is believed to be correct and should be followed in the instant case. Accordingly, attorney fees cannot be awarded Plaintiff under 36 Okla.Stat.Supp. 1977 § 3629 B." *Ibid*. at 718.

Both the Oklahoma Supreme Court and the Tenth Circuit Court of Appeals have dealt with 36 O.S. § 3629 B since the decision in **Gay**

& Taylor, *supra*. **An-Son Corporation v. Holland-American Insurance Company**, 767 F.2d 700 (10th Cir.1985); **Shinault v. Mid-Century Insurance Co.**, 654 P.2d 618 (Okla.1982). Neither case mentioned **Gay & Taylor**, suggesting that the issue of constitutional violation was not injected into either case. This is perhaps due to a decision in the Oklahoma intermediate Courts of Appeal, **Pierce v. Western Cas. & Sur. Co.**, 666 P.2d 1313 (Okl.App.), which held the title to 36 O.S. 3629, when read in its full text[2] as passed by the Oklahoma Legislature rather than the abbreviated caption presumably prepared by West Publishing Company, was broad enough to permit inclusion of a provision for attorney's fees.

Owens attempts to distinguish **An-son** and **Shinault** as being "first party" actions, i.e. an action by an insured against the insurer, thereby arguably different from Owens' garnishment action as a judgment creditor or State Farm's action for declaratory judgment. No authority is cited for such differentiation. The **An-son** Court stated:

> "Those Oklahoma cases which have interpreted § 3639(B)--all "first party" actions--appear to have given the statute a broad reading. In *McCorkle v. Great Atlantic Insurance Co.*, 637 P.2d 583, 586 (Okla.1981), the Supreme Court of Oklahoma simply stated that the "award of attorney fees to the prevailing party in a suit by an insured against the insurer is provided for by statute in

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[2] The title of the act, as it appears in the 1977 Session Laws, reads thus:
"AN ACT RELATING TO INSURANCE; AMENDING 36 O.S.1971, SECTION 3629; REQUIRING INSURER TO FURNISH PROOF OF LOSS FORMS; ADDING REQUIREMENT THAT INSURER SUBMIT WRITTEN SETTLEMENT OFFER WITHIN SPECIFIED TIME; ADDING PROVISION ALLOWING COSTS TO PREVAILING PARTY AND DEFINING PREVAILING PARTY; PROVIDING EXCEPTION; AND SETTING AN EFFECTIVE DATE."

> Oklahoma." In *Shinault v. Mid-Century Insurance Co.*, 654 P.2d 618, 619 (Okla.1982), the court interpreted § 3629(B) as qualifying those conditions under which an *insurer* may recover attorneys fees, i.e. where the insurer is the prevailing party. The insurer is the prevailing party where the judgment is for less than any settlement offer that was tendered to the insured, or where the insured rejects the claim and no judgment is awarded. Such a reading is consistent with the language of § 3629(b), which goes on to state that "[i]n *all* other judgments the insured shall be the prevailing party." (emphasis added). There is no question that An-son was the prevailing party in the instant action.

The Court reads **An-son** to hold that the insurer is the prevailing party when no judgment is entered against it. There is no question that a judgment was not entered against State Farm but rather was entered in favor of State Farm and against Jerry Owens.

The Court concludes 36 O.S. § 3629 B is appropriate authority for granting attorney fees to Plaintiff herein, obviating a discussion of 12 O.S. § 1190, 12 O.S. § 936 or 28 U.S.C. § 2202. Since it appears Defendant Owens has not contested the amount of the attorneys fees requested, i.e. the reasonableness of the rates and hours expended, but only whether same should be taxed as costs, the Court concludes such amount to be reasonable under the circumstances.

The Court concludes State Farm's Motion To Tax Attorneys Fees As Costs should be and the same is hereby GRANTED.

IT IS SO ORDERED this 15th day of June, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. ANITA HEAD a/k/a ANITA FRAZIER and JERRY OWENS, Defendants.	Case No. 90-C-1014-B CONSOLIDATED
JERRY OWENS, Plaintiff, vs. ANITA FRAZIER, now ANITA HEAD, Defendant, and STATE FARM GENERAL INSURANCE COMPANY, Garnishee.	Case No. 91-C-90-B

O R D E R

This matter comes on for consideration of Plaintiff State Farm Mutual Automobile Insurance Company's (State Farm) Motion To Tax Attorney's Fees As Costs, against Defendant Jerry Owens.

Prior hereto, on November 27, 1991, the Court entered its Order granting State Farm's Motion For Summary Judgment on its Declaratory Judgment Complaint and dismissing the related (consolidated) Garnishment Action as moot. The essential facts, as set forth in the Court's earlier Order are:

1. On February 16, 1982, Jerry Owens (Owens) was involved in

an automobile accident with Anita Frazier (Frazier, now Head). Frazier was driving a 1977 Chevrolet Silverado Pickup Truck owned by her then boyfriend and later husband, Leon Head.

2. On December 8, 1982, Owens sued Frazier for injuries related to the accident in Tulsa County District Court, CT82-1098. On December 9, 1982, Frazier was served with Summons.

3. On February 11, 1983, default judgment was rendered against Frazier for $263,876.65, including $2,126.65 medical bills, $6,750 lost wages, $5,000 future medical, $2,500 attorneys fees and $250,000 in pain and suffering.

4. Over six years later, Frazier appeared at an Asset Hearing in CT82-1098 on February 23, 1989. Frazier stated by affidavit that she did not contact State Farm about the accident or suit until she discussed it with a State Farm representative after the 1989 Asset Hearing. Tamara Poulton, Claim Superintendent for State Farm, stated by affidavit that State Farm did not receive notice of the accident or the state court suit until after the asset hearing in February 1989, having been notified by an investigator working on behalf of Owens who was seeking to determine if State Farm had any coverage for Frazier.

5. State Farm engaged attorneys, under a reservation of rights, to represent Frazier in attempting to set aside the default judgment entered in CT82-1098. On September 24, 1990, state Judge Boudreau issued Findings of Fact and Conclusions of Law in Tulsa County District Court Case No. CJ90-0686 in which he found that Frazier was (properly) served with Summons and that the judgment

entered in CT82-1098 should not be set aside or vacated.

7. On the date of the accident, State Farm had in force and effect a liability insurance policy, # 169-4817-D08-36 (Policy 4817), issued to Leon Head as named insured, listing a 1975 Chevrolet Pickup Truck as the described vehicle. The 1975 Chevrolet Pickup Truck had previously been stolen, and the 1977 Chevrolet Silverado Pickup Truck mentioned in paragraph 1 above had been purchased by Head as a replacement for the stolen 1975 vehicle.[1] The 1977 Pickup truck was a Newly Acquired Vehicle under Policy 4817.

8. Owens had also made claim under policy number 178-9055-F27-36 (Policy 9055). Policy 9055 was not in effect on February 16, 1982, the date of the accident. Also Policy 9055 covered a 1968 Chevrolet which was not involved in the subject accident.

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Under the record State Farm was not notified of the accident until February, 1989 (Leon Head's affidavit, offered by State Farm, failed to reflect that any notification to State Farm occurring prior to February, 1989). The lack of notification to State Farm was also established in the affidavit of Tamara Poulton.

The lack of notification to State Farm earlier than in February, 1989, was in the Court's view, the most critical fact.

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[1] The Court noted that in the affidavit of Leon Head the following appears: "4. On February 24, 1982 I requested State Farm to substitute the 1977 Pickup for the 1975 Pickup on policy No. 169 4817 D08 36." What did *not* appear in Head's affidavit was any statement that he notified State Farm of the accident involving the 1977 Pickup which had occurred 8 days earlier.

Owens was required to do more, to survive a motion for summary judgment, than merely suggest a genuine dispute exists as to whether either Head, Frazier or anyone advised State Farm of the fact of such accident and related litigation prior to the time Frazier acknowledges having informed State Farm of such fact.

In Oklahoma, the statute of limitations on an action begins to run when the cause of action accrues, and an accrual occurs when the claimant first could have maintained his action to a successful conclusion. **Matter of Estate of Crowl**, 737 P.2d 911 (Ok. 1987).

The Court concluded that any cause of action under the insurance contract on the 1977 vehicle would have first accrued when Owens secured his judgment against Frazier on February 11, 1983. The Court further concluded that such right of action was controlled by 12 O.S. §95, the limitations statute dealing with written contracts, which provides that an action must be commenced within five years from the time the cause of action accrues. **Matter of Estate of Crowl**, *737 P.2d 911 (OK.1987)*, not done in this case. Therefore, any action which could have been maintained under Policy 4817 must have been filed by February 11, 1988, which was not done, thereby barring any claim under the Policy.

The Court concluded State Farm was not given proper and timely notice of either the accident or the litigation resulting in a judgment against Frazier, which notice was due State Farm under the policy in issue. This lack of notice prevented, in the Court's view, the imposition of liability under the Policy on the facts established.

Thereafter State Farm filed its Motion To Tax Attorney's Fees As Costs, citing as authority therefore 36 O.S. § 3629 B, 28 U.S.C. § 2202 and 12 O.S. § 1190. The archetypical authority for attorneys fees in Oklahoma, 12 O.S. § 936, was cited by neither party.

36 O.S. § 3629 B provides, in part, as follows:

> **§ 3629. Forms of proof of loss; offer of settlement or rejection of claim.**
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> * * *
>
> B. It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party.

The 1977 amendment, Laws 1977, c. 133, § 1. eff. Oct. 1, 1977, added subsection B, which several federal courts have concluded runs afoul of the Oklahoma Constitution. **Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins.**, 550 F.Supp. 710 (D.C.W.D.OK-1981), held:

> "As to Plaintiff's claim for an attorney fee based upon 36 Okla.Stat.Supp. 1977 § 3629 B, said statute as it relates to providing for an attorney fee has been declared in violation of the Oklahoma Constitution by Judge Ralph G. Thompson of this Court. *First National Bank and Trust Company of El Reno v. Transamerica Insurance Company*, CIV-79-1358-T (W.D.Okl. October 9, 1981). Judge Thompson found that § 3629 B did not mention attorney fees in the title to the Act as required by Art. 5, § 57 of the Oklahoma Constitution and for such reason said statute contravenes the Oklahoma Constitution as to the provision for an attorney fee. Judge Thompson's analysis of Oklahoma law is believed to be correct and should be followed in the instant case. Accordingly, attorney fees cannot be awarded Plaintiff under 36 Okla.Stat.Supp. 1977 § 3629 B." *Ibid.* at 718.

Both the Oklahoma Supreme Court and the Tenth Circuit Court of Appeals have dealt with 36 O.S. § 3629 B since the decision in **Gay**

& Taylor, *supra*. **An-Son Corporation v. Holland-American Insurance Company**, 767 F.2d 700 (10th Cir.1985); **Shinault v. Mid-Century Insurance Co.**, 654 P.2d 618 (Okla.1982). Neither case mentioned **Gay & Taylor**, suggesting that the issue of constitutional violation was not injected into either case. This is perhaps, due to a decision in the Oklahoma intermediate Courts of Appeal, **Pierce v. Western Cas. & Sur. Co.**, 666 P.2d 1313 (Okl.App.), which held the title to 36 O.S. 3629, when read in its full text[2] as passed by the Oklahoma Legislature rather than the abbreviated caption presumably prepared by West Publishing Company, was broad enough to permit inclusion of a provision for attorney's fees.

Owens attempts to distinguish **An-son** and **Shinault** as being "first party" actions, i.e. an action by an insured against the insurer, thereby arguably different from Owens' garnishment action as a judgment creditor or State Farm's action for declaratory judgment. No authority is cited for such differentiation. The **An-son** Court stated:

> "Those Oklahoma cases which have interpreted § 3639(B)--all "first party" actions--appear to have given the statute a broad reading. In *McCorkle v. Great Atlantic Insurance Co.*, 637 P.2d 583, 586 (Okla.1981), the Supreme Court of Oklahoma simply stated that the "award of attorney fees to the prevailing party in a suit by an insured against the insurer is provided for by statute in

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The Court reads **An-son** to hold that the insurer is the prevailing party when no judgment is entered against it. There is no question that a judgment was not entered against State Farm but rather was entered in favor of State Farm and against Jerry Owens.

The Court concludes 36 O.S. § 3629 B is appropriate authority for granting attorney fees to Plaintiff herein, obviating a discussion of 12 O.S. § 1190, 12 O.S. § 936 or 28 U.S.C. § 2202. Since it appears Defendant Owens has not contested the amount of the attorneys fees requested, i.e. the reasonableness of the rates and hours expended, but only whether same should be taxed as costs, the Court concludes such amount to be reasonable under the circumstances.

The Court concludes State Farm's Motion To Tax Attorneys Fees As Costs should be and the same is hereby GRANTED.

IT IS SO ORDERED this 15th day of June, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. ANITA HEAD a/k/a ANITA FRAZIER and JERRY OWENS, Defendants.	Case No. 90-C-1014-B CONSOLIDATED
JERRY OWENS, Plaintiff, vs. ANITA FRAZIER, now ANITA HEAD, Defendant, and STATE FARM GENERAL INSURANCE COMPANY, Garnishee.	Case No. 91-C-90-B

J U D G M E N T

In accord with the Order filed herein on June 15th, 1992, sustaining State Farm's Motion To Tax Attorneys Fees As Costs[1] the Court hereby enters Judgment in favor of State Farm Mutual Automobile Insurance Company and against Jerry Owens in the amount

[1] An Amended Bill of Costs in favor of State Farm, in the amount of $401.60, was allowed by the Clerk of the Court on December 12, 1991.

of $7,476.00, plus interest thereon from this date at the rate of 4.26% per annum until paid.

DATED this 15 day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 17 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SHERRIE R. KAPLAN,

Plaintiff,

vs.

GEORGE RENBERG, DONALD RENBERG, ROBERT RENBERG and DEAN WITTER REYNOLDS, INC.,

Defendants.

Case No. 92-C-210-E

ENTERED ON DOCKET

DATE 6-18-92

AGREED ORDER REGARDING DEAN WITTER ACCOUNTS OF GEORGE J. RENBERG AND DONALD B. RENBERG

This Agreed Order is entered with respect to the accounts of George J. Renberg and Donald B. Renberg at Dean Witter Reynolds, Inc. ("Dean Witter"), known respectively as the George J. Renberg Revocable Trust Account ("George's Account") and the Donald B. Renberg Account ("Donald's Account") (collectively the "Dean Witter Accounts").

The Court hereby orders as follows:

1. George will maintain a separate account at Dean Witter during the pendency of this litigation, with securities, monies and/or funds initially totalling at least $2 million. George Renberg will not attempt to withdraw, transfer, pledge or otherwise encumber those funds, except that he may make suitable investments and trades, and receive the net income therefrom.

2. There are no restrictions upon Donald's Account, except that should an accounting of the Dorothy Renberg Trust demonstrate that any funds in Donald's Account were improperly

transferred or diverted from the Family Trust or First Share Trust, Donald Renberg shall maintain in or place into Donald's Account, and shall segregate, securities, monies and/or funds at least equal to such amounts.

3. Dean Witter is entitled to abide by all instructions given by George Renberg and Donald Renberg as to their respective accounts and shall not be liable to any party hereto for abiding by such instructions.

4. Dean Witter's Motion for Summary Judgment is deemed withdrawn without prejudice to its right to reassert all arguments made therein. Plaintiff's claims against Dean Witter are hereby dismissed without prejudice. Dean Witter's Counter-Claims and Cross-Claims are hereby dismissed without prejudice. Nothing in this Order is to be construed as an admission by any party, or evidence in favor of, the claims of any party. The orders of dismissal herein contained are without prejudice to the right of any party hereto to move the Court for an award of attorney's fees or costs as against any other party hereto, following entry of judgment or a final stipulation of dismissal.

This Order shall remain in force and effect during the pendency of this litigation, provided, however, that the parties may apply to this Court at any time to modify, suspend or withdraw this order.

IT IS SO ORDERED this 16th day of June, 1992.

S/ JAMES O. ELLISON

James O. Ellison
United States District Judge

TAC/05-92401

AGREED TO AND APPROVED:

James M. Sturdivant
Timothy A. Carney
ATTORNEYS FOR SHERRIE RENBERG KAPLAN

Eugene P. de Verges
Ted M. Riseling
ATTORNEYS FOR GEORGE R. RENBERG

Sam P. Daniel, Jr.
John J. Carwile
ATTORNEYS FOR DONALD B. RENBERG

J. David Jorgenson
John A. Bugg
ATTORNEYS FOR DEAN WITTER REYNOLDS, INC.

Stephen L. Andrew
ATTORNEY FOR ROBERT RENBERG

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROY L. JACKSON,

Plaintiff,

vs.

INTEGRA, INC. d/b/a RESIDENCE INN, MARRIOTT INC.,

Defendant.

No. 89-C-816-E
91-C-1-E,
Consol.

ORDER
AND
JUDGMENT

This matter is before the Court on the Defendants' motion for summary judgment.[1] Defendants' motion is granted for the following reasons.

Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment against a party who, after time for discovery, fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

After review of the entire record, the Court finds that Defendants are entitled to summary judgment because Plaintiff's false misrepresentations on his employment application precludes Plaintiff from any relief or remedy at law. Summers v. State Farm

[1]On December 31, 1991, Defendants filed a similar motion for summary judgment on Mr. Jackson's Title VII claim in Case No. 91-C-01-B. On February 19, 1992, Judge Brett transferred that case to Judge Ellison by Minute Order, which changed the case number to 91-C-01-E. Both motions for summary judgment are included in this Order.

Mutual Automobile Insurance Company, 864 F.2d 700 (10th Cir. 1988).

It is undisputed that Plaintiff made material misrepresentations on his employment application. In Summers, an analogous case, the Court held:

> [W]hile after-acquired evidence cannot be said to have been a "cause" for Summers' discharge in 1982, it is relevant to Summers' claim of "injury" and does itself preclude the grant of any present relief or remedy to Summers.

Summers, 864 F.2d at 708.

In Mathis v. Boeing Military Airplane Co., 719 F.Supp. 991 (D.Ks. 1989), the court rejected the plaintiff's argument that her wrongdoing did not rise to a level to warrant granting a motion for summary judgment and held:

> In the instant case, material omissions were made by plaintiff on the employment application. They were material for the simple reason that defendant relied upon such omissions in hiring plaintiff. Additionally, the obvious difference in the number of falsifications has little impact on the level of wrongdoing in the present case. In Summers, the 150 falsifications were directly related to the employee's work. By the same token, plaintiff's omissions of her unfavorable work record is directly related to her employment.

Similarly, Defendants did rely on Plaintiff's false misrepresentations on said application in hiring Plaintiff. The Court recognizes Summers as controlling law.

The Court finds there is no genuine issue of material fact that Plaintiff did not truthfully, accurately, or responsively complete Defendant's employment application. Consequently, based upon the undisputed facts of this case Plaintiff is entitled to no relief. Sweeney v. U-Haul Co. of Chicago, 55 FEP 1257 (N.D. Ill.

1991).

IT IS THEREFORE ORDERED that Defendants' motion for summary judgment is hereby granted; all pending motions are therefore moot.

ORDERED this 16TH day of June, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN BINARY TECHNOLOGY, INC., et al., Plaintiffs,	)	
vs.	)	No. 91-C-326-E
DIGITAL EQUIPMENT CORPORATION, Defendant.	)	

ORDER AND JUDGMENT

Comes now before the Court for its consideration Plaintiffs' motion for dismissal without prejudice of this action against Defendant. After review of the pleadings and for good cause shown, the Court finds that Plaintiffs' motion to dismiss without prejudice should be granted; however, Plaintiffs are ordered to return to Defendant all of Defendant's documents, including all copies in Plaintiffs' possession or provided by Plaintiffs to third parties.

The Court also finds that all information exchanged during discovery consisting of trade secrets, customer lists, pricing information or privileged documentation shall be covered by the protective order of this Court as verbally entered by Magistrate Wagner on October 31, 1991.

IT IS THEREFORE ORDERED that Plaintiffs' motion to dismiss without prejudice is hereby granted and Plaintiffs are required to return to Defendant all of Defendant's documents in Plaintiffs' possession or provided by Plaintiffs to third parties. The Court

recognizes and adopts the verbal order entered by Magistrate Wagner on October 31, 1991 and all parties are subject to same.

So ORDERED this 16th day of June, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROY L. JACKSON,

Plaintiff,

vs.

INTEGRA, INC. d/b/a RESIDENCE INN, MARRIOTT INC.,

Defendant.

No. 89-C-816-E
91-C-1-E,
Consol.

ORDER
AND
JUDGMENT

This matter is before the Court on the Defendants' motion for summary judgment.[1] Defendants' motion is granted for the following reasons.

Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment against a party who, after time for discovery, fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

After review of the entire record, the Court finds that Defendants are entitled to summary judgment because Plaintiff's false misrepresentations on his employment application precludes Plaintiff from any relief or remedy at law. Summers v. State Farm

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IT IS THEREFORE ORDERED that Defendants' motion for summary judgment is hereby granted; all pending motions are therefore moot.

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JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. ANITA HEAD a/k/a ANITA FRAZIER and JERRY OWENS, Defendants.	Case No. 90-C-1014-B CONSOLIDATED
JERRY OWENS, Plaintiff, vs. ANITA FRAZIER, now ANITA HEAD, Defendant, and STATE FARM GENERAL INSURANCE COMPANY, Garnishee.	Case No. 91-C-90-B

J U D G M E N T

In accord with the Order filed herein on June 15th, 1992, sustaining State Farm's Motion To Tax Attorneys Fees As Costs[1] the Court hereby enters Judgment in favor of State Farm Mutual Automobile Insurance Company and against Jerry Owens in the amount

[1] An Amended Bill of Costs in favor of State Farm, in the amount of $401.60, was allowed by the Clerk of the Court on December 12, 1991.

of $7,476.00, plus interest thereon from this date at the rate of 4.26% per annum until paid.

DATED this 15 day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. ANITA HEAD a/k/a ANITA FRAZIER and JERRY OWENS, Defendants.	Case No. 90-C-1014-B CONSOLIDATED
JERRY OWENS, Plaintiff, vs. ANITA FRAZIER, now ANITA HEAD, Defendant, and STATE FARM GENERAL INSURANCE COMPANY, Garnishee.	Case No. 91-C-90-B

O R D E R

This matter comes on for consideration of Plaintiff State Farm Mutual Automobile Insurance Company's (State Farm) Motion To Tax Attorney's Fees As Costs, against Defendant Jerry Owens.

Prior hereto, on November 27, 1991, the Court entered its Order granting State Farm's Motion For Summary Judgment on its Declaratory Judgment Complaint and dismissing the related (consolidated) Garnishment Action as moot. The essential facts, as set forth in the Court's earlier Order are:

1. On February 16, 1982, Jerry Owens (Owens) was involved in

an automobile accident with Anita Frazier (Frazier, now Head). Frazier was driving a 1977 Chevrolet Silverado Pickup Truck owned by her then boyfriend and later husband, Leon Head.

2. On December 8, 1982, Owens sued Frazier for injuries related to the accident in Tulsa County District Court, CT82-1098. On December 9, 1982, Frazier was served with Summons.

3. On February 11, 1983, default judgment was rendered against Frazier for $263,876.65, including $2,126.65 medical bills, $6,750 lost wages, $5,000 future medical, $2,500 attorneys fees and $250,000 in pain and suffering.

4. Over six years later, Frazier appeared at an Asset Hearing in CT82-1098 on February 23, 1989. Frazier stated by affidavit that she did not contact State Farm about the accident or suit until she discussed it with a State Farm representative after the 1989 Asset Hearing. Tamara Poulton, Claim Superintendent for State Farm, stated by affidavit that State Farm did not receive notice of the accident or the state court suit until after the asset hearing in February 1989, having been notified by an investigator working on behalf of Owens who was seeking to determine if State Farm had any coverage for Frazier.

5. State Farm engaged attorneys, under a reservation of rights, to represent Frazier in attempting to set aside the default judgment entered in CT82-1098. On September 24, 1990, state Judge Boudreau issued Findings of Fact and Conclusions of Law in Tulsa County District Court Case No. CJ90-0686 in which he found that Frazier was (properly) served with Summons and that the judgment

entered in CT82-1098 should not be set aside or vacated.

7. On the date of the accident, State Farm had in force and effect a liability insurance policy, # 169-4817-D08-36 (Policy 4817), issued to Leon Head as named insured, listing a 1975 Chevrolet Pickup Truck as the described vehicle. The 1975 Chevrolet Pickup Truck had previously been stolen, and the 1977 Chevrolet Silverado Pickup Truck mentioned in paragraph 1 above had been purchased by Head as a replacement for the stolen 1975 vehicle.[1] The 1977 Pickup truck was a Newly Acquired Vehicle under Policy 4817.

8. Owens had also made claim under policy number 178-9055-F27-36 (Policy 9055). Policy 9055 was not in effect on February 16, 1982, the date of the accident. Also Policy 9055 covered a 1968 Chevrolet which was not involved in the subject accident.

9. State Farm had no policies in effect for Anita Frazier.

Under the record State Farm was not notified of the accident until February, 1989 (Leon Head's affidavit, offered by State Farm, failed to reflect that any notification to State Farm occurring prior to February, 1989). The lack of notification to State Farm was also established in the affidavit of Tamara Poulton.

The lack of notification to State Farm earlier than in February, 1989, was in the Court's view, the most critical fact.

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[1] The Court noted that in the affidavit of Leon Head the following appears: "4. On February 24, 1982 I requested State Farm to substitute the 1977 Pickup for the 1975 Pickup on policy No. 169 4817 D08 36." What did *not* appear in Head's affidavit was any statement that he notified State Farm of the accident involving the 1977 Pickup which had occurred 8 days earlier.

Owens was required to do more, to survive a motion for summary judgment, than merely suggest a genuine dispute exists as to whether either Head, Frazier or anyone advised State Farm of the fact of such accident and related litigation prior to the time Frazier acknowledges having informed State Farm of such fact.

In Oklahoma, the statute of limitations on an action begins to run when the cause of action accrues, and an accrual occurs when the claimant first could have maintained his action to a successful conclusion. **Matter of Estate of Crowl**, 737 P.2d 911 (Ok. 1987).

The Court concluded that any cause of action under the insurance contract on the 1977 vehicle would have first accrued when Owens secured his judgment against Frazier on February 11, 1983. The Court further concluded that such right of action was controlled by 12 O.S. §95, the limitations statute dealing with written contracts, which provides that an action must be commenced within five years from the time the cause of action accrues. **Matter of Estate of Crowl**, *737 P.2d 911 (OK.1987)*, not done in this case. Therefore, any action which could have been maintained under Policy 4817 must have been filed by February 11, 1988, which was not done, thereby barring any claim under the Policy.

The Court concluded State Farm was not given proper and timely notice of either the accident or the litigation resulting in a judgment against Frazier, which notice was due State Farm under the policy in issue. This lack of notice prevented, in the Court's view, the imposition of liability under the Policy on the facts established.

Thereafter State Farm filed its Motion To Tax Attorney's Fees As Costs, citing as authority therefore 36 O.S. § 3629 B, 28 U.S.C. § 2202 and 12 O.S. § 1190. The archetypical authority for attorneys fees in Oklahoma, 12 O.S. § 936, was cited by neither party.

36 O.S. § 3629 B provides, in part, as follows:

> **§ 3629. Forms of proof of loss; offer of settlement or rejection of claim.**
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> "As to Plaintiff's claim for an attorney fee based upon 36 Okla.Stat.Supp. 1977 § 3629 B, said statute as it relates to providing for an attorney fee has been declared in violation of the Oklahoma Constitution by Judge Ralph G. Thompson of this Court. *First National Bank and Trust Company of El Reno v. Transamerica Insurance Company*, CIV-79-1358-T (W.D.Okl. October 9, 1981). Judge Thompson found that § 3629 B did not mention attorney fees in the title to the Act as required by Art. 5, § 57 of the Oklahoma Constitution and for such reason said statute contravenes the Oklahoma Constitution as to the provision for an attorney fee. Judge Thompson's analysis of Oklahoma law is believed to be correct and should be followed in the instant case. Accordingly, attorney fees cannot be awarded Plaintiff under 36 Okla.Stat.Supp. 1977 § 3629 B." *Ibid.* at 718.

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The Court reads **An-son** to hold that the insurer is the prevailing party when no judgment is entered against it. There is no question that a judgment was not entered against State Farm but rather was entered in favor of State Farm and against Jerry Owens.

The Court concludes 36 O.S. § 3629 B is appropriate authority for granting attorney fees to Plaintiff herein, obviating a discussion of 12 O.S. § 1190, 12 O.S. § 936 or 28 U.S.C. § 2202. Since it appears Defendant Owens has not contested the amount of the attorneys fees requested, i.e. the reasonableness of the rates and hours expended, but only whether same should be taxed as costs, the Court concludes such amount to be reasonable under the circumstances.

The Court concludes State Farm's Motion To Tax Attorneys Fees As Costs should be and the same is hereby GRANTED.

IT IS SO ORDERED this 15th day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	No. 84-CR-5-01-E
	)	
HAROLD ED BURNETT,	)	91-C-886-E ✓
	)	
Defendant-Petitioner.	)	

O R D E R

Upon motion by Mr. Burnett requesting dismissal of his Motion to Vacate, Set Aside or Correct Sentence pursuant to 20 U.S.C. §2255, the Court has reviewed the record and finds the motion should be granted. The Court further finds that the remaining pending issues are thereby rendered moot.

So ORDERED this 16th day of June, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN M. ANDREW

Plaintiff,

v.

READING & BATES CORPORATION, a Delaware corporation

Defendant.

CASE NO. 92-C-163-E

ORDER OF DISMISSAL

In accordance with the Stipulation of Dismissal signed by counsel for plaintiff John E. Andrew and counsel for defendant Reading & Bates Corporation, it is ORDERED that Civil Action No. 92-C-163-E is dismissed, with prejudice, with costs of Court incurred to be paid by the party bearing them.

Signed this 16th day of June, 1992.

UNITED STATES DISTRICT JUDGE

Andrew1.60

6/17/92

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. CALVIN CALDWELL a/k/a CALVIN G. CALDWELL; PRISCILLA CALDWELL; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 92-C-179-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16th day of June, 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear not, having previously disclaimed any right, title or interest in the subject property; and the Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell and Priscilla Caldwell, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Calvin Caldwell a/k/a Calvin G. Caldwell, was served with Summons and Complaint on May 13, 1992; that the Defendant, Priscilla Caldwell, was served with Summons and Complaint on May 13, 1992; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 5, 1992; and that Defendant, Board

of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 3, 1992.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on March 23, 1992, disclaiming any right, title or interest in the subject property; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on March 23, 1992, disclaiming any right, title or interest in the subject property; and that the Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell and Priscilla Caldwell, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Fifteen (15), Block Three (3), LOUISVILLE HEIGHTS ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on August 23, 1985, the Defendants, Calvin Caldwell and Priscilla Caldwell, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $35,500.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Calvin Caldwell and Priscilla Caldwell, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated August 23, 1985, covering the above-described property. Said mortgage was recorded on August 22, 1985, in Book 4886, Page 1387, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell and Priscilla Caldwell, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell and Priscilla Caldwell, are indebted to the Plaintiff in the principal sum of $34,462.47, plus interest at the rate of 11.5 percent per annum from April 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $8.40 for service of Summons and Complaint.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell and Priscilla Caldwell, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell and Priscilla Caldwell, in the principal sum of $34,462.47, plus interest at the rate of 11.5 percent per annum from April 1, 1991 until judgment, plus interest thereafter at the current legal rate of 4.26 percent per annum until paid, plus the costs of this action in the amount of $8.40 for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell, Priscilla Caldwell, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell and Priscilla Caldwell, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 92-C-179-B

KBA/esr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HILL CONSTRUCTION CORP., Plaintiff,	)	
v.	)	No. 90-C-634-B
ALLIANCE SHIPPERS, INC., TULSA HELICOPTERS, INC., and "XYZ" INSURANCE COMPANY, Defendants.	)	

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment is hereby entered in favor of the Plaintiff, Hill Construction Corporation, and against the Defendant, Alliance Shippers, Inc., in the amount of $24,573.77, plus post-judgment interest at the rate of 4.26% per annum from the date hereon.

Costs are assessed against the Defendant, Alliance Shippers, Inc., as well as reasonable attorney's fees, if timely applied for pursuant to Local Rule 6.

DATED this 15th day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 17 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TIM McCOLLUM,

Plaintiff,

vs.

TOWN OF WEST SILOAM SPRINGS, OKLAHOMA; MIKE WILKERSON, individually and in his official capacity as Mayor of the Town of West Siloam Springs, Oklahoma; THEODORE GEARY, MONTEZ COCHRAN, GROVER PARENT, and GLEN DAVIDSON, each individually and in their capacity as member of the Board of Trustees of the Town of West Siloam Springs, Oklahoma; and ALAN MILNER, individually and in his capacity as Clerk of the Town of West Siloam Spring, Oklahoma,

Defendants.

No. 91-C-938-B

STIPULATION OF DISMISSAL WITH PREJUDICE

All parties stipulate that the above case should be dismissed, with prejudice.

Tim McCollum
TIM McCOLLUM

D. Littlejohn
DEWAYNE LITTLEJOHN,
Attorney for Plaintiff

E. S. Lawbaugh
E. S. LAWBAUGH,
Attorney for Plaintiff

John Lieber
JOHN H. LIEBER,
Attorney for Defendants

MAG\Siloam.SDP

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. SUN REFINING AND MARKETING COMPANY, Defendant.	91-C-884-B Civil Action No.

CONSENT DECREE

Plaintiff, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), has filed a Complaint, alleging that Defendant, Sun Refining and Marketing Company ("SUN"), has violated the Clean Water Act, 33 U.S.C. § 1251 et seq. (the "Act"), and the conditions and limitations of National Pollutant Discharge Elimination System ("NPDES") Permit No. OK0000876.

SUN owns and operates a wastewater processing unit ("WPU") located within its Tulsa, Oklahoma refinery.

The United States and SUN consent to the entry of this Decree without trial of any issues of law or fact, and the United States and SUN hereby stipulate to the Court that in order to resolve the issues stated in the United States' Complaint, this Consent Decree should be entered.

NOW THEREFORE, it is hereby ORDERED AND DECREED as follows:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over SUN pursuant to Section 309 of the Act, 33 U.S.C.

§ 1319, and 28 U.S.C. § 1345. Venue is proper in this district under Section 309(b) of the Act, 33 U.S.C. § 1319(b). The Complaint states a claim upon which relief may be granted under Section 309 of the Act, 33 U.S.C. § 1319.

II. BINDING EFFECT

The provisions of this Consent Decree shall apply to and be binding upon the United States, SUN, its officers, directors, agents, trustees, servants, employees, successors, assigns and all persons, firms, and corporations acting under the control or direction of SUN.

SUN shall condition the transfer of ownership, operation, or other interest, or any contract related to the performance of the WPU upon successful execution of the terms and conditions of this Decree.

SUN shall give written notice of this Consent Decree to any successor in interest at least thirty (30) days prior to transfer of operation, ownership or other interest of the whole, or any part, of SUN's Tulsa refinery and shall give written notice of this Consent Decree to any successor in interest and to any contractor retained to perform any activity required by this Decree. At least thirty (30) days in advance of any such transfer, SUN shall notify, in writing, all parties at the addresses specified in section XVIII of this Consent Decree.

III. OBJECTIVES

The express purpose of the parties in entering this Consent Decree is to further the objectives of the Act, as enunciated in

Section 101 of the Act, 33 U.S.C. § 1251. All plans, studies, construction, remedial maintenance, monitoring programs, and other obligations in this Decree or resulting from the activities required by this Decree shall have the objective of ensuring that SUN is and remains in full compliance with the Act, including compliance with the terms and conditions of NPDES Permit No. OK0000876, renewals, modifications, revisions, or amendments to the Permit, and the provisions of applicable Federal and State laws and regulations governing discharges from SUN's WPU.

IV. REMEDIAL ACTION

Except as otherwise provided in this Consent Decree, on the date of lodging of this Decree, SUN shall achieve and thereafter maintain compliance with the effluent limits established in SUN's NPDES Permit No. OK0000876 and the Act, in accordance with the following schedule:

SUN shall submit to EPA, Region 6, a Composite Correction Plan ("CCP") that describes how the Tulsa refinery will attain and maintain compliance with NPDES Permit No. OK0000876 and the Act. SUN must develop the CCP regardless of the availability of Federal and State construction grant assistance and the CCP must adequately address projected future wastewater flows. SUN agrees to complete the remedial activities listed below on or before the following dates:

		Due Date
(a)	SUN shall obtain the professional capability (on staff or under contract) necessary to plan and design the treatment facilities that will achieve compliance with the Permit and Act.	Completed
(b)	SUN shall initiate a study of all feasible corrective actions (technology and costs) necessary to achieve compliance with the NPDES Permit and the Act.	Completed
(c)	SUN shall conclude the study described in (b), above and submit a copy of the study and CCP for information purposes to the State of Oklahoma (the "State") and EPA.	Completed
(d)	SUN shall notify the State and EPA of the corrective actions selected to achieve compliance by submitting an engineering summary of the corrective actions. The engineering summary shall include: 1. The design criteria; 2. The design capacity; and 3. A listing of all treatment (operating and backup), including characteristics rated pollutant removal capability.	December 1, 1991

(e) SUN shall complete construction of needed improvements to the WPU according to the following schedule:

Design of Improvements	December 15, 1991
Advertise Bids	January 1, 1992
Receive Bids	January 15, 1992
Award Construction Bid/Contract	February 1, 1992
Begin Construction	March 15, 1992
Complete Construction of Improvement to the WPU	February 15, 1993
Achieve and Thereafter Maintain Compliance with NPDES Permit No. OK0000876 and the Act.	May 1, 1993

V. EFFLUENT LIMITS AND MONITORING REQUIREMENTS

A. Pre-construction Effluent Limits and Monitoring Requirements

SUN shall comply with the effluent limits and monitoring requirements established in NPDES Permit No. OK0000876 from the date of lodging of this Consent Decree until the commencement of construction as specified in Section IV.(e) of this Consent Decree.

B. Interim Effluent Limits and Monitoring Requirements

SUN shall comply with the following interim effluent limits and monitoring requirements from the commencement of construction pursuant to Section IV.(e) of this Consent Decree until May 1, 1993:

Parameter	Daily Average (lbs/day)	Daily Maximum (lbs/day)
Biochemical Oxygen Demand (5-day) ("BOD_5")	3,180	6,220
Total Suspended Solids ("TSS")	1,175	2,350
Chemical Oxygen Demand ("COD")	17,350	33,125
Phenols	8.2	22.5
Ammonia ("NH_3")	482	1,200
Hexchrom ("CR+6")	0.64	1.43

Monitoring Requirements

SUN shall monitor and analyze effluent at the outfalls 001 and 002 in accordance with the terms and requirements of NPDES Permit No. OK0000876, except that SUN also shall continue quarterly bio-monitoring for chronic static renewal seven (7) day

larval survival and growth test using fathead minnows (pimephales promelas) (EPA Test Method 1000.0). This testing shall be continued for outfalls 001 and 002 until December 31, 1991. This testing also shall be performed in accordance with the provisions of Part II.f of NPDES Permit OK0000876.

C. Final Effluent Limits

On or before May 1, 1993, SUN shall achieve and thereafter maintain compliance with the final effluent limits and monitoring requirements at the WPU as established in SUN's NPDES Permit No. OK0000876.

VI. FUNDING

SUN's compliance with the requirements of this Consent Decree is not conditioned on the receipt of any Federal or State grant funds. In addition, SUN's compliance is not excused by the failure to obtain any Federal or State grant funds, or by the shortfall of such funds, or by the pendency of any applications for the same.

VII. REPORTING

A. In addition to Discharge Monitoring Reports, which shall include the results of sampling and analysis required by SUN's NPDES permit, SUN shall submit written reports to EPA, Region 6, on a quarterly basis. Such reports shall contain the following information:

1. Deadlines and other requirements of the Consent Decree that SUN was required to meet that quarter;

2. Whether SUN met those requirements;

3. The date the requirements were met or are expected to be met;

4. A description of all tasks undertaken to meet the requirements of the Consent Decree for that quarter;

5. A projection of the work to be performed pursuant to this Decree during the following twelve (12) month period;

6. A description of the reasons for any noncompliance with the requirements of this Decree. The description of noncompliance shall include the reasons for the noncompliance, whether any delay in the final compliance date will result, and if so, the anticipated date of compliance. Notification to EPA shall not excuse the delay or any violations of the requirements of this Consent Decree. Information reported pursuant to the Force Majeure provision of this Consent Decree need not be repeated in the report required by this paragraph.

SUN shall include in its quarterly reports reasonably available documentation to verify the status and progress of activities required by this Decree.

B. The quarterly reports shall be submitted to EPA, Region 6, within the first fifteen (15) days of the month immediately following the last month of each quarter. The first quarter shall begin on the first day of the month following the month in which this Consent Decree is lodged with the Court.

C. Within ten (10) days immediately following the deadline date of any requirement contained in Section IV of this Decree, SUN shall notify EPA, Region 6, in writing, of compliance or noncompliance with said requirement, the reason(s) for any noncompliance, and a plan for preventing such noncompliance in the future.

D. Certification Language and Definitions

All reports required to be submitted by the terms of this Consent Decree, as well as verifications of compliance with milestone dates and/or other actions required by this Consent Decree, shall contain certification signed by a responsible official as that term is defined below. The certification shall read as follows:

> "I certify that the information contained in or accompanying this (submission/document) is true, accurate, and complete.
>
> "As to (the/those) identified portion(s) of this (submission/document) for which I cannot personally verify (its/their) truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting under my direct instructions, made the verification, that this is true, accurate, and complete."

"Responsible official" shall mean corporate officer as defined below.

"Corporate Officer" shall mean a president, secretary, treasurer, or vice president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or the manager of one (1) or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $35 million if the authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

VIII. STIPULATED PENALTIES

SUN shall pay stipulated penalties for violation of the requirements of this Consent Decree as follows:

A. For each day that SUN fails to comply with any of the requirements in this Decree (other than the effluent limitations contained in Section V, for which a penalty is stipulated in sub-section VIII(B), below):

Period of Violation	Penalty
1st to 30th day	$500.00/day per violation
31st to 60th day	$750.00/day per violation
After 60 days	$1,500.00/day per violation

B. For each day that SUN fails to comply with the effluent limits established in NPDES Permit No. OK0000876 or fails to comply with any interim effluent limitations established in this Consent Decree, SUN shall pay stipulated penalties as follows:

Violation of Each Parameter (e.g., BOD, TSS)	Penalty
Daily Maximum	$500.00 per violation per day
Daily Average	$750.00 per violation per month

C. Nothing herein shall preclude plaintiff from seeking any legal or equitable relief for violations of this Consent Decree, including, but not limited to, injunctive relief, and civil or criminal contempt sanctions. Where acts or omissions that constitute a violation of this Consent Decree also constitute a violation of the Clean Water Act, plaintiff may elect, in its sole discretion, to seek civil penalties under the Act. If plaintiff elects to seek civil penalties under the Act, the amount of any timely paid stipulated penalties for such violation

shall be deducted from the amount of the civil penalty for such violation.

D. SUN shall pay any stipulated penalties by cashier's or certified check or by money order payable to "Treasurer of the United States," by the 15th day of the month following the month in which the violations occurred, together with a letter describing the basis for the penalties. SUN shall pay stipulated penalties in the same manner as the civil penalty required by Section X of this Decree.

E. In the event a dispute concerning the payment of penalties arises, SUN shall not submit the penalty, as required by Subsection D above, until such dispute is resolved pursuant to Section XII herein. However, if the dispute is resolved in favor of EPA, then SUN shall pay stipulated penalties for each day of violation and shall pay interest, which shall begin to accrue on the 16th day of the month following the month in which the violations occurred. Such payment shall be considered timely for purposes of Paragraph VIII.C of this Decree. If the dispute is resolved in favor of SUN, neither penalties nor interest shall be due.

IX. FORCE MAJEURE

A. SUN'S obligation to comply with the schedules and deadlines for compliance established in this Consent Decree may be delayed or excused only to the extent that noncompliance is caused by circumstances entirely beyond the control of SUN. SUN

shall take all reasonable measures to avoid or minimize the delay or noncompliance.

B. SUN shall notify EPA, Region 6, in writing within ten (10) days after learning of any circumstances which SUN knew or should have known may cause delayed compliance or failure to comply. The notice shall describe the anticipated length of the delay or noncompliance, its cause, and the measures taken and to be taken by the defendant to prevent or minimize the delay or noncompliance. Failure by SUN to provide such notice shall bar SUN from being excused for such noncompliance with this Consent Decree on grounds of force majeure.

C. If EPA agrees that any noncompliance with this Consent Decree was caused by circumstances entirely beyond the control of SUN, the parties may stipulate to an appropriate modification of this Consent Decree. Extension of any deadline shall be for a period no longer than the delay caused by the circumstances which were entirely beyond SUN's control, and stipulated penalties shall not be due for said noncompliance.

D. If EPA does not agree that noncompliance with this Consent Decree was caused by circumstances entirely beyond the control of SUN, SUN may petition the Court for resolution and/or appropriate relief pursuant to Section XII of this Decree. Increased costs, changed financial circumstances, or technical infeasibility of meeting NPDES effluent limits shall not constitute circumstances entirely beyond the control of defendant

and shall not serve as a basis for extensions of time to comply with the requirements of this Consent Decree.

E. Compliance with any requirement of this Decree by itself, shall not constitute compliance with any other requirement. An extension of one compliance date based on a particular incident shall not necessarily result in an extension of subsequent compliance date(s). SUN must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

F. SUN shall bear the burden of proving that any delay or violation of any requirement of this Consent Decree was caused by circumstances entirely beyond the control of SUN or any entity controlled by SUN, including SUN's consultants and contractors. SUN shall also bear the burden of proving the duration and extent of any delay or violation attributable to such circumstances.

X. PENALTY FOR PAST VIOLATIONS

A. SUN shall pay a civil penalty in the amount of four hundred thousand dollars ($400,000.00) in full satisfaction of SUN's civil liability for SUN's violations of the terms and conditions of its NPDES Permit through the date of lodging of this Decree. Payment shall be made within thirty (30) days after the date of entry of this Decree by delivering a cashier's or certified check or money order in the sum stated above payable to the "Treasurer of the United States" to the United States Attorney for the Northern District of Oklahoma at the following address:

U.S. Attorney's Office
Northern District of Oklahoma
3600 U.S. Courthouse
333 W. 4th Street
Tulsa, Oklahoma 74103

SUN shall mail a copy of the check and transmittal letter tendering such check to the following:

U.S. Environmental Protection Agency
Region 6
Office of Regional Counsel
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
Attn: Cheryl Boyd (6C-AW)

U.S. Environmental Protection Agency
Region 6
Water Enforcement Division
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202
Attn: Jim Olander

Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: DOJ No. 90-5-1-1-3442
Civil Action No. _____

Such payment shall not be deductible for Federal taxation purposes. The transmittal letter shall include the caption, civil action number and judicial district of this action.

B. Upon final entry of this Consent Decree, the United States shall be deemed a judgment creditor for purposes of collection of this penalty and enforcement of this Decree.

XI. INTEREST

SUN shall pay interest for any late payment of civil or stipulated penalties. The rate of interest shall be that established at 28 U.S.C. § 1961.

XII. DISPUTE RESOLUTION

In the event a dispute should arise between the parties regarding the implementation of the requirements of this Decree, SUN shall comply with the position of EPA, Region 6, unless SUN files a petition with the Court for resolution of the dispute within thirty (30) days of receipt of the EPA, Region 6's final written position. The petition shall set forth the nature of the dispute and shall include a proposal for resolution of the dispute. The United States shall have thirty (30) days to file a response. In any such dispute, SUN shall have the burden of proving that EPA's position is arbitrary and capricious and is not in accord with the objectives of this Decree, and that SUN's proposal will achieve compliance with the terms and conditions of its permit and the Act by the date required by this Consent Decree.

XIII. RIGHT OF ENTRY

EPA or its representatives, including contractors, consultants, and attorneys for the United States shall have the authority to enter any facility covered by this Decree, at reasonable hours, upon presentation of identification to the manager or managers of the facility or, in the manager's absence,

XV. FAILURE TO ACHIEVE COMPLIANCE

The United States does not, by its consent to the entry of this Decree, warrant or aver in any manner that SUN's complete compliance with this Decree will result in compliance with the provisions of the Act, 33 U.S.C. § 1251 et seq., or NPDES Permit No. OK0000876. Notwithstanding EPA's review of any plans formulated pursuant to this Consent Decree, SUN shall remain solely responsible for compliance with the terms of the Act, this Decree and SUN's NPDES permit.

XVI. NON-WAIVER PROVISION

A. Compliance with this Consent Decree does not diminish or affect SUN's responsibility to comply with any Federal or State or local law or regulation. Nothing contained in this Decree shall be construed to prevent or limit the United States' right to obtain penalties or injunctive relief under the Act or other federal statutes or regulations except as expressly specified herein.

B. The parties agree that SUN is responsible for achieving and maintaining complete compliance with all applicable Federal and State laws, regulations, and permits, except as provided in Section V(B) herein, and that compliance with this Decree shall be no defense to any actions commenced pursuant to said laws, regulations, or permits.

C. This Consent Decree does not limit or affect the rights of SUN or the United States as against any third parties, nor

does it limit the rights of third parties, not parties to this Consent Decree, against SUN.

XVII. COSTS OF SUIT

Each party shall bear its own costs and attorney's fees in this action.

XVIII. FORM OF NOTICE

Except as specified otherwise, when written notification to or communication with the United States, EPA, Region 6, Defendant, or the State is required by the terms for this Consent Decree, it shall be addressed as follows:

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7611
Ben Franklin Station
Washington, D.C. 20044
Reference Case No. 90-5-1-1-3442

As to EPA Region 6:

Cheryl Boyd (6C-A/W)
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

As to the Defendant:

Edward J. Ciechon, Esq.
Sun Refining & Marketing Company
10 Penn Center
1801 Market Street, 17th Floor
Philadelphia, PA 19103

Sun Refining & Marketing Company
Tulsa Refinery
1700 South Union
Tulsa, Oklahoma 74107
Attn: Refinery Manager

Notifications or communications with the EPA or the United States shall be deemed submitted on the date they are either (1) post-marked and sent by certified mail, return receipt requested or (2) marked by electronic mail.

XIX. MODIFICATION

Except as provided for herein, there shall be no modification of this Consent Decree without written approval of all the parties to this Consent Decree and the Court.

XX. PUBLIC NOTICE AND COMMENT

The parties agree and acknowledge that final approval by the United States and entry of this Decree is subject to the requirements of 28 C.F.R. § 50.7 which provides the notice of the lodging of the Consent Decree in the Federal Register, an opportunity for public comment, and consideration of any comments. Following the close of the comment period, plaintiff may withdraw or modify its consent to the terms of this Consent Decree on the basis of the comments received.

XXI. CONTINUING JURISDICTION OF THE COURT

The Court shall retain jurisdiction to enforce the terms and conditions of this Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Decree.

XXII. TERMINATION

This Consent Decree shall terminate only after SUN has paid all penalties due, has completed all remedial measures specified herein, and EPA has determined that SUN has satisfactorily

achieved compliance with its NPDES Permit for a period of six (6) consecutive months from the date SUN achieves final compliance. Compliance with effluent limits shall be determined on the basis of information reported in SUN's Discharge Monitoring Reports.

By their undersigned counsel the parties enter into this Consent Decree and submit it to the Court for approval and entry.

IT IS SO ORDERED.

Dated and entered this 16th day of June 1992.

6-16-92
DATE

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

WE HEREBY CONSENT to the entry of this Consent Decree, subject to the public notice requirements of 28 C.F.R. § 50.7.

FOR THE UNITED STATES OF AMERICA

Date

BARRY M. HARTMAN
Acting Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

September 30, 1991
Date

DONNA D. DUER
Trial Attorney
Environmental Enforcement Section
United States Department of Justice
Washington, D.C. 20530
(202) 514-1448

TONY M. GRAHAM
United States Attorney
Northern District of Oklahoma

12/12/91
Date

By: PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103

9/23/91
Date

~~RAY LUDWISZEWSKI~~ EDWARD E. REICH
Acting Assistant Administrator for Enforcement
U.S. Environmental Protection Agency
Washington, D.C. 20460

FOR SUN REFINING AND MARKETING COMPANY

July 30, 1991
Date

W. THOMAS McCOLLOUGH
Tulsa Refinery Manager
Sun Refining and Marketing Co.
1700 South Union
Tulsa, Oklahoma 74107

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 6-16-92

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

CIVIL NUMBER 92-C-418 E

BYRON S. WELLS,
495-70-9448

Defendant,

FILED

JUN 16 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, United States of America, by and through its attorney, Clifton R. Byrd, District Counsel, Department of Veterans Affairs, Muskogee, Oklahoma, and voluntarily dismisses said action without prejudice under the provisions of Rule 41(a)(1), Federal Rules of Civil Procedure.

Respectfully submitted,

UNITED STATES OF AMERICA

Clifton R. Byrd

Clifton R. Byrd
District Counsel
Department of Veterans Affairs
125 South Main Street
Muskogee, OK 74401
Phone: (918) 687-2191

CERTIFICATE OF MAILING

This is to certify that on the _____ day of _____, 1992, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: BYRON S. WELLS, at 12002 E. 88TH PL., N., OWASSO, OK 74055.

GLORIA J. HIGHERS
Paralegal Specialist

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. 79 cardboard cases, more or less, of an article of drug, each case containing 12/1.25 ounce jars, and 43 cardboard cases, more or less, each case containing 126/6.25 ounce jars, labeled in part: (case) "1 DOZ. Donnie's REJUVENATION GROWTH CREME *** American Beauty Products TULSA, OK. 74106 ***" (jar) "Donnie's REJUVENATION GROWTH CREME *** NET WT. *** Ingredients: Petrolatum, steryl alcohol, vitamins, protein *** AMERICAN BEAUTY PRODUCTS CO., INC. Tulsa Oklahoma 74106 ***" and various articles of drug and accompanying labeling identified in Attachment "A" which are located at American Beauty Products Co., Inc. 1623 East Apache Street, Tulsa, Oklahoma, Defendants.	Civil Action No. 92-C-50-E DEFAULT DECREE OF CONDEMNATION AND DESTRUCTION

On January 21, 1992, a Complaint for Forfeiture against the above described articles was filed in this Court on behalf of the United States of America by its attorneys Tony M. Graham, United States Attorney for the Northern District of Oklahoma, and Catherine J. Depew, Assistant United States Attorney.

The complaint alleges that the articles of drug, as described in the caption and Attachment A, proceeded against are drugs which are misbranded while held are drugs within the meaning of 21 U.S.C. 321(g) which may not be introduced or delivered for introduction into interstate commerce under 21 U.S.C. 355(a) since each article is a "new drug" within the meaning of 21 U.S.C. 321(p) and subject to the provisions of 21 U.S.C. 355, and no approval of an application filed pursuant to 21 U.S.C. 355(b) has been approved for any such drug; and

The Complaint further alleges that the articles of drug are misbranded within the meaning of 21 U.S.C. 352(f)(1) in that their labels fail to bear adequate directions for use since the articles are unapproved new drugs and are not exempt from such requirement under 21 C.F.R. 201.115; and 352(o) in that they were manufactured in an establishment not duly registered as required by 21 U.S.C. 360, and that they have not been included in a list filed in accordance with 21 U.S.C. 360(j)(1); and

Thus, the articles of drug, as described in the caption and Attachment A, are illegally within the jurisdiction of this Court and are liable to seizure and condemnation.

Pursuant to a warrant for arrest issued by this Court, the United States Marshal for this district seized the articles on January 23, 1992.

It appearing that process was duly issued herein and returned according to law; that public notice of the arrest and seizure of the articles was given according to law and that no

person has appeared to claim the seized articles within the time specified by the applicable rule, Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure;

THEREFORE, on motion of the plaintiff, United States of America, for a Default Decree of Condemnation and Destruction, it is hereby:

ORDERED, ADJUDGED, AND DECREED that the seized articles of drug, as described in the caption and Attachment A, may not be introduced into interstate commerce pursuant to 21 U.S.C. § 355(a) since they are "new drugs" within the meaning of 21 U.S.C. § 321(p) and no approval of an application filed pursuant to 21 U.S.C. § 355(b) is in effect for such drugs as alleged in the Complaint, and the seized articles are therefore condemned and forfeited hereby under 21 U.S.C. § 344(a) and it is further

ORDERED, ADJUDGED, AND DECREED that the seized articles are misbranded while held for sale after shipment in interstate commerce within the meaning of the Act, 21 U.S.C. § 352(f)(1), in that their labeling fails to bear adequate directions for use because the articles are unapproved new drug and are not exempt from such requirements under 21 C.F.R. § 201.115 as alleged in the Complaint, and therefore, are condemned and forfeited hereby under 21 U.S.C. § 334(a), and it is further

ORDERED, ADJUDGED, AND DECREED, pursuant to 21 U.S.C. 334(d), that the United States Marshal for the Northern District of Oklahoma shall destroy forthwith the condemned articles and

make due return to this Court. Destruction shall be in a manner that complies with the requirements of the National Environmental Policy Act of 1969.

Dated this 15th day of June, 1992.

S/ JAMES O. ELLISON

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT J. SODEN, a/k/a BOB SODEN,

Plaintiff,

v.

STATE FARM GENERAL INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY, foreign corporations,

Defendants.

No. 92-C-251-EB

ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW ON, this, the 15th day of June, 1992, comes on to be heard the Stipulation Of Dismissal Without Prejudice of the State Farm Fire and Casualty Company, only. The Court, being well advised in the premises, finds that the State Farm Fire and Casualty Company should be and hereby is dismissed from this action, without prejudice.

IT IS SO ORDERED!

Judge

APPROVED AS TO FORM AND CONTENT:

Brian A. Curthoys
Attorney for Plaintiff

Walter D. Haskins
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAXINE ADRIANCE, et ux.,)
)
Plaintiffs,)
)
v.) Case No.: 91-C-209-CB
)
MARC ABEL, et al.,)
)
Defendants.)

ORDER OF DISMISSAL WITH PREJUDICE PURSUANT TO RULE 41(a)(2)

NOW on this 15 day of June, 1992, the Plaintiffs' Motion for Dismissal with Prejudice Pursuant to Rule 41(a)(2) comes on for consideration. The Court finds that the above-styled case should be dismissed with prejudice against the following Defendants Marc Abel, Triad Eye Medical Clinic and Cataract Institute, Inc., Osteopathic Hospital Founders Association, Tulsa Regional Medical Center, Inc., Oklahoma Osteopathic Hospital, and Various Jane and John Does. The Court finds that there should be no terms or conditions placed on this dismissal except that all parties shall pay their own costs.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the above-styled case is dismissed with prejudice against the following Defendants Marc Abel, Triad Eye Medical Clinic and Cataract Institute, Inc., Osteopathic Hospital Founders Association, Tulsa Regional Medical Center, Inc., Oklahoma Osteopathic Hospital, and Various Jane and John Does, and that all parties shall pay their own

costs. It is finally ordered that the Plaintiffs shall mail a copy of this order to the Attorneys for the Defendants.

United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MEMOREX TELEX CORPORATION, a Delaware corporation,

Plaintiff,

vs.

GENERAL ELECTRIC COMPANY, a New York corporation,

Defendant.

Case No. 90-C-511-E

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, it is hereby stipulated by and between Memorex Telex Corporation and General Electric Company, by their attorneys, that all claims asserted in this action shall be dismissed with prejudice, with each of the parties to bear its own costs.

Joel L. Wohlgemuth, OBA #9811
NORMAN & WOHLGEMUTH
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

Attorney for Plaintiff
Memorex Telex Corporation

Claire V. Eagan, OBA #554
HALL, ESTILL, HARDWICK,
GOLDEN & NELSON
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

Attorney for Defendant
General Electric Company

159

JUN 16 1992

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. GERALD D. HARRIS; EDDIE M. HARRIS; FIDELITY FINANCIAL SERVICES, INC.; WORLD AND TRIBUNE FEDERAL CREDIT UNION; STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION; STATE OF OKLAHOMA ex rel. DEPARTMENT OF HUMAN SERVICES; HILLCREST MEDICAL CENTER; JOHN DOE, TENANT; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	CIVIL ACTION NO. 91-C-908-B

FILED

JUN 15 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of June, 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendant, World & Tribune Federal Credit Union, appears not, having previously filed its Disclaimer; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears not, having previously filed its Disclaimer; the Defendant, State of Oklahoma ex rel. Department of Human Services, appears by Vicki A. Cox, Esq.; the Defendant, Hillcrest Medical Center, appears by Houston I. Shirley, Esq.; the Defendant, John Doe, Tenant, appears not, and should be dismissed from this action; the Defendant, County Treasurer, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District

NOTE: THIS [illegible] BY MOVANTS IMMEDIATELY
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

Attorney, Tulsa County, Oklahoma; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, appears not, having previously filed its Answer disclaiming any right, title or interest in the subject property; and the Defendants, Gerald D. Harris, Eddie M. Harris and Fidelity Financial Services, Inc., appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Gerald D. Harris, acknowledged receipt of Summons and Complaint on December 5, 1991; that the Defendant, Fidelity Financial Services, Inc., acknowledged receipt of Summons and Complaint on November 26, 1991; that the Defendant, World & Tribune Federal Credit Union, acknowledged receipt of Summons and Complaint on December 2, 1991; that Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on November 27, 1991; that Defendant, State of Oklahoma ex rel. Department of Human Services, acknowledged receipt of Summons and Complaint on December 11, 1991; that Defendant, Hillcrest Medical Center, acknowledged receipt of Summons and Complaint on November 26, 1991; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on December 2, 1991; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 27, 1991.

The Court further finds that Defendant, John Doe, Tenant, has not been served as such person does not exist, and therefore should be dismissed as a Defendant.

The Court further finds that the Defendant, Eddie M. Harris, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 10, 1992, and continuing to March 16, 1992, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Eddie M. Harris, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, Eddie M. Harris. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of

residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on December 17, 1991; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on December 17, 1991, disclaiming any right, title or interest in the subject property; the Defendant, World & Tribune Federal Credit Union, filed its Disclaimer on December 10, 1991; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on December 12, 1991; the Defendant, State of Oklahoma ex rel. Department of Human Services, filed its Answer on December 11, 1991; the Defendant, Hillcrest Medical Center, filed its Answer on December 12, 1991; and that the Defendants, Gerald D. Harris, Eddie M. Harris, and Fidelity Financial Services, Inc., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-three (23), Block Five (5), NORTHRIDGE, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on June 2, 1976, the Defendant, Gerald D. Harris, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, his mortgage note in the amount of $12,000.00, payable in monthly installments, with interest thereon at the rate of 9 percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Gerald D. Harris, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated June 2, 1976, covering the above-described property. Said mortgage was recorded on June 2, 1976, in Book 4217, Page 1244, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Gerald D. Harris, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Gerald D. Harris, is indebted to the Plaintiff in the principal sum of $9,854.29, plus interest at the rate of 9 percent per annum from November 1, 1990 until judgment, plus interest thereafter at the legal rate until fully

paid, and the costs of this action in the amount of $316.75 ($20.00 docket fees, $296.75 publication fees).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $246.00, plus penalties and interest, for the year of 1991. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $2.00 which became a lien on the property as of June 20, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, World & Tribune Federal Credit Union and State of Oklahoma ex rel. Oklahoma Tax Commission, disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendants, Gerald D. Harris, Eddie M. Harris and Fidelity Financial Services, Inc., are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Department of Human Services, has a lien on the

property which is the subject matter of this action by virtue of a Judgment, No. FD-86-0323, dated April 3, 1986 and recorded in the records of Tulsa County, Oklahoma on April 7, 1986 in Book 4934 at Page 662 in the amount of $3,941.00. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Hillcrest Medical Center, has a lien on the property which is the subject matter of this action by virtue of a Judgment filed June 16, 1988 in the District Court In an For Tulsa County, State of Oklahoma, Case No. SC-86-01431 and recorded on June 20, 1988 in the records of Tulsa County, Oklahoma in Book 5108 at Page 746 in the amount of $498.55, together with interest thereon, costs, and attorney's fees as are provided in the journal entry of judgment, and any other applicable records in the office of the above named court. Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Gerald D. Harris, in the principal sum of $9,854.29, plus interest at the rate of 9 percent per annum from November 1, 1990 until judgment, plus interest thereafter at the current legal rate of 4.76 percent per annum until paid, plus the costs of this action in the amount of $316.75 ($20.00 docket fees, $296.75 publication fees), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff

for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $246.00, plus penalties and interest, for ad valorem taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $2.00 for personal property taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Gerald D. Harris, Eddie M. Harris, Fidelity Financial Services, Inc., John Doe, Tenant, and the Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property, and that the Defendant, John Doe, Tenant is hereby dismissed as a Defendant herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, World & Tribune Federal Credit Union and State of Oklahoma ex rel. Oklahoma Tax Commission, disclaim any right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Department of Human Services, have and recover judgment in the amount of $3,941.00.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Hillcrest Medical Center, have and recover judgment in the amount of $498.55, together with interest thereon, costs, and

attorney's fees as are provided in the journal entry of judgment in Case No. SC-86-01431, District Court of Tulsa County.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Gerald D. Harris, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $246.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, State of Oklahoma ex rel. Department of Human Services, in the amount of $3,941.00.

Fifth:

In payment of Defendant, Hillcrest Medical Center, in the amount of $498.55, together with interest thereon, costs, and attorney's fees.

Sixth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $2.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendant,
County Treasurer, Tulsa County, Oklahoma

HOUSTON I. SHIRLEY, OBA #8188
Attorney for Defendant, Hillcrest Medical Center

VICKI A. COX, OBA #10766
Attorney for Defendant, Department of Human Services

Judgment of Foreclosure
Civil Action No. 91-C-908-B

PB/esr

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD CO.,

Plaintiff,

vs.

AMERICAN AIRLINES, INC., et al.,

Defendants.

AND OTHER CONSOLIDATED ACTIONS

Case No.'s 89-C-868-B
89-C-869-B
90-C-859-B

VACUUM & PRESSURE TANK TRUCK SERVICES,

Defendant and Third Party Plaintiff,

vs.

AMERIGAS, INC.; ATLAS TRUCKING CO., INC.; AYCOCK LEASING a/k/a AYCOCK INVESTMENT COMPANY; B & D TRUCK SERVICE; BALDOR ELECTRIC COMPANY; BALDWIN PIANO & ORGAN CO.; BALL BROS TRUCKING CO.; BAVARIAN MOTORS, INC.; BROWN & ROOT, INC.; CHICKASHA MANUFACTURING CO., INC.; CONMACK, INC.; CONOCO, INC.; CONTINENTAL BAKING COMPANY; GREYHOUND LINES, INC.; CRAIN INDUSTRIES, INC.; AMERICAN CAN COMPANY d/b/a DIXIE CUPS; DESOTO, INC.; ENVIRO-CHEM CORPORATION; ERNIE MILLER PONTIAC GMC, INC.; EXXON CORPORATION; FACET ENTERPRISES, INC. a/k/a PURALATOR PRODUCTS CO.; FEST IMPORTS, INC.; FINE TRUCK LINE, INC.; FORSGREN, INC.; FRANKS & SONS, INC.; GEAR PRODUCTS, INC.; GRIEF BROS CORPORATION; HACKNEY BROTHERS BODY COMPANY; HALLETT CONSTRUCTION COMPANY,

HEEKING CAN, INC.; JOHN HENSHAL; HUDSON OIL COMPANY; J R WOODS TRANSPORT SERVICES, INC.; JONES TRUCK LINES, INC.; LITTLE ROCK ROAD MACHINERY; MASONITE CORPORATION; MOLL TOOL & PLASTIC; BAXTER HEALTH CARE CORPORATION; OKLAHOMA SOLVENTS & CHEMICAL COMPANY; P M F, INC.; PETROLEUM MARKETING CO.; STANDARD BRANDS, INC. d/b/a PLANTERS PEANUTS; PORCHE RACING; REID SUPPLY COMPANY; RENTAL UNIFORM SERVICES, INC. a/k/a T&G LEASING, INC.; ROLLINS TRUCK RENTAL; SCREW CORPORATION DIVISION VSI; SUPERWRENCH, INC.; SYNTEX AGRI BUSINESS INC. a/k/a SYNTEX CORPORATION; T D WILLIAMSON, INC.; TEXAS INSTRUMENTS, INC., TIMEX CORPORATION; TRANSMISSION SPECIALISTS COMPANY; TULSA TRAILER & BODY, INC.; U S POLLUTION CONTROL, INC.; UNION CARBIDE CHEMICALS AND PLASTIC COMPANY, INC.; VALMONT OILFIELD PRODUCTS COMPANY; WASTE MANAGEMENT OF TULSA, INC.; YATES IMPLEMENT CO., INC.; COMMERCIAL CARTAGE; OLYMPIC OIL COMPANY; RUTHERFORD/PACIFIC, INC.

Third Party Defendants.

NOTICE OF DISMISSAL OF THIRD PARTY DEFENDANT, REID SUPPLY COMPANY

COMES NOW the Defendant/Third Party Plaintiff Vacuum & Pressure Tank Truck Services, Inc., pursuant to and in accordance with Rule 41(a)(1), Federal Rules of Civil Procedure, and hereby dismisses its Third Party Complaint in relation to the Third Party Defendant, Reid Supply Company.

Respectfully Submitted,

DOYLE & HARRIS

Steven M. Harris, OBA #3913
Michael D. Davis, OBA #11282
2431 E. 61st St., Suite 260
Tulsa, OK 74136
(918) 743-1276

CERTIFICATE OF MAILING

I do hereby certify that on the 16th day of ~~May~~ June, 1992, I caused to be mailed a true and correct copy of the above and foregoing instrument to the following parties with proper postage fully prepaid thereon.

Larry Gutterridge
SIDLEY & AUSTIN
2049 Century Park East
Suite 3500
Los Angeles, CA 90067

William Anderson
DOERNER, STUART, et al.
1000 Atlas Life Building
415 S. Boston
Tulsa, OK 74103

Steven M. Harris
Michael D. Davis

610-1.25/rawp

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MORTGAGE CLEARING CORPORATION,

Plaintiff,

vs.

VEREX ASSURANCE, INC.,

Defendant.

Case No. 87-C-777-B

O R D E R

This matter comes on for consideration of Plaintiff, Mortgage Clearing Corporation's (MCC) Motion To Revise Partial Agreed Judgment Under Rule 54(b). Also under consideration is MCC's Motion For New Trial And/Or To Alter And Amend Judgment. Additionally for the Court's consideration are both parties' Motions To Review Taxation Of Costs By Court Clerk.

A Partial Agreed Judgment was previously entered herein, on December 5, 1988, after extensive settlement negotiations involving a magistrate. The judgment construed various disputed policy terms and thereby provided a vehicle for resolving the parties' disputes regarding insurance coverage and contract interpretation. MCC seeks a revision "[I]n order to demonstrate that the defendant Verex Assurance, Inc., has complied with the terms of said partial agreed judgment" and also "to reflect payment of the sum of $395,450.39 and full and final settlement of the rights and liabilities of all of the parties herein." MCC cites only Rule 54(b), F.R.Civ.P., in support of its Motion.

Defendant Verex Assurance, Inc. (Verex) opposes MCC's motion on both procedural and factual grounds. Verex agrees that Rule 54(b) provides that any non-final orders of the Court are "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." However, Verex argues MCC's Motion was procedurally too late having been filed on April 17, 1992, one day after the jury's verdict against MCC on the remaining claims herein.[1]

It is apparent to the Court the sums paid by Verex to MCC were a result of a settlement of disputed claims between the parties and not payment ordered by the Partial Agreed Judgment itself. Defendant's Trial Exhibit No. 159[2] provides:

> "It is expressly understood and agreed that this settlement is a compromise of disputed claims and that any payment specified herein is not to be construed as an admission of liability on the part of Verex, which liability is expressly denied."

Further, if MCC is attempting to bootstrap itself from a settling litigant to a prevailing judgment creditor for the purpose of later seeking attorney fees as a "prevailing party", the Tenth Circuit Court of Appeals has already spoken on that issue in its opinion of June 10, 1991:

---

[1] The Court's Judgment, reflecting the jury's verdict, was also filed April 17, 1992, the same day MCC filed its Motion To Revise Partial Agreed Judgment. In view of the Court's disposition herein it is immaterial who filed first on April 17, 1992.

[2] Exhibit 159 is Verex' May 26, 1989 letter to MCC regarding Verex' willingness to settle the matters addressed in that letter in spite of the insistence of MCC's counsel that he is, notwithstanding a settlement, entitled to a trial on the subject of his attorney's fees and punitive damages.

> "In addition, we affirm the district court's order with respect to the denial of MCC's attorneys' fees for services performed in connection with the settlement of the underlying coverage claims. For the reasons listed by the district court, MCC was not a prevailing party that could, under Oklahoma law recover attorneys' fees. " *Id.* at page 9.

The Court agrees with the parties that Rule 54(b) is a vehicle to appropriately revise non-final orders "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." However, the Court disagrees, for the reasons stated above, that any revision is appropriate herein.

The Court concludes MCC's Motion To Revise Partial Agreed Judgment should be and the same is hereby DENIED.

The Court next considers MCC's Motion For New Trial And/Or To Alter And Amend Judgment.

In this Motion MCC alleges four grounds to grant a new trial and one ground to alter and amend the Court's Judgment of April 17, 1992. The new trial grounds are:

> 1. The Court's failure to instruct the jury on a statutory requirement that an insurance investigation be completed within 45 days pursuant to 36 O.S. §1256(C).
> 2. The Court's failure to construe the policies and instruct the jury that the foreclosure attorney fees were insured.
> 3. The Court's failure to instruct the jury that the primary policy required Verex to exercise its settlement option within 30 days.
> 4. The jury's verdict is contrary to the weight of the evidence.

MCC's argument to alter and amend the April 17, 1992, Judgment is that it is the prevailing party under the Partial Agreed Judgment, having achieved much of the relief sought in this suit, and is therefore entitled to costs. MCC requests the Court to alter the

April 17 Judgment to provide that costs are assessed against Verex rather than in favor of Verex as the Judgment recites.

As stated earlier, the Tenth Circuit Court of Appeals opinion affirmed the District Court's conclusions as to MCC's lack of right to attorneys fees as a prevailing party under 36 O.S. § 3629(B). However, this Court recognizes that one may recover costs yet be denied an attorneys fee since the latter may be based upon contract, statute or equity. This Court notes that the matter of costs was not mentioned in the District Court's Opinion of August 2, 1989, its Judgment thereon of August 9, 1989[3], nor the Court of Appeals opinion.

Local Rule 6 E provides: "Upon entry of judgment or decree in any case or proceeding, the party recovering costs shall * * * file * * * a verified bill of costs * * *" (emphasis supplied). The Judgment entered April 17, 1992, based upon the jury verdict could only have granted costs limited to the bad faith claims, both actual and punitive. The Court of Appeals opinion stated at page 10:

> "Any determination of the appropriate allocation of attorneys' fees and costs for the bad faith tort claim will have to await resolution of that issue in the district court."

Since the Partial Agreed Judgment of December 5, 1988, made no mention of costs nor did Judge Phillips' later Order and Judgment, MCC could not be a "party recovering costs" as anticipated by Local Rule 6 E.

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[3] Filed August 16, 1989.

Earlier herein the Court denied MCC's Motion To Revise Partial Agreed Judgment to reflect subsequent payments made to it pursuant to the agreed policy interpretations which policy provisions had been disputed by the parties. Therefore that judgment stands as entered and it does not provide for the allowance of costs to either party.

The Court concludes MCC's Motion to Alter the Judgment entered herein on April 17, 1992, should be and the same is hereby DENIED.

The Court next considers MCC's allegations that the Court failed to instruct the jury on three vital issues, the 45 day investigation period, foreclosure attorneys fees being insured under the policies and the 30 day limit for Verex to exercise its settlement option under the policies.

Initially the Court notes that MCC failed to object to the instructions given by the Court to the jury. The Court has reviewed the reporter's transcript of the instruction conferences and concludes MCC's counsel acquiesced in the instructions finally given. In addition to the instruction conferences the Court presented the parties with the opportunity, immediately after reading the instructions to the jury, to make any record desired. Counsel for MCC objected only to the Court's failure to give Plaintiff's requested Instruction No. 16[4] which related to the

[4] Plaintiff's Requested Instruction No. 16 read: "You are instructed that the Verex Corporate Procedure Series One Servicing/Claims Manual, effective 7/1/86 is not a part of any of the insurance policies nor can it be considered by you as an amendment to or variance of or amendment of any of the insurance policies. The rights and obligations of the parties are determined solely by the insurance policies.

Verex Servicing/Claims Manual.

MCC argues the Court is not foreclosed by a party's failure to object to instructions given and is required by the doctrine of fundamental error to pass upon the issues raised in a motion for new trial. Under this test the Court is of the view the instructions given (and the instructions not given which MCC now alleges should have been given) fairly presented the applicable law and the parties' respective contentions to the jurors. **Commercial Iron & Metal Co. v. Bache Halsey Stuarts, Inc.**, 581 F.2d 246, 250 (10th Cir.1978), *cert. den.* 440 U.S. 914 (1979). Instructions are not required to be faultless in every particular. **Robinson v. Audi NSU Auto Union Aktiengesellschaft**, 739 F.2d 1481, 1486 (10th Cir. 1984); **United States v. Westbo**, 516 F.2d 285 (10th Cir. 1978).

The 45 day investigation period provided for in 36 O.S. §1256(C) is part of the Oklahoma Claims Resolution Act. Neither this Act nor the Unfair Claim Settlement Practices Act creates a private cause of action. The Court concluded and concludes an instruction as to this section was unneeded. Likewise the Court viewed and views instructions that the policies provide that foreclosure attorney fees were insured and that Verex may exercise an option to pay the entire amount of a given loss and take title to the real estate as also unneeded. The policies were in evidence and the Court made it abundantly clear to the parties on several occasions that they may argue to the jury policies provisions.

The Court was and is of the view the instruction given entitled "STATUTORY AND CONTRACT DUTIES" fairly set forth

significant statutory and contractual duties between the parties sufficient to allow the jury to make a reasoned determination of the issues herein. To have added every possible duty, statutory and contractual, owed by the parties each to the other could have misled the jury or added confusion to an already complex case. **Audi NSU Auto Union Aktiengesellschaft**, *supra* .

Lastly, the Court, as the "thirteenth juror"[5] is of the view the jury verdict is supported by the evidence in the record. The Court believes there was ample evidence to support the lack of "bad faith" on the part of Verex. The Court concludes the jury's verdict was warranted under the evidence.

The Court next considers the matter of costs. Verex, on April 28, 1992, filed a Bill Of Costs in the amount of $15,597.98. On May 1, 1992, MCC filed a Bill Of Costs in the amount of $1,916.02. A hearing was held before the Clerk of the Court on May 13, 1992, wherein the Clerk entered costs in favor of Verex in the amount of $6,174.45 and denied costs to MCC. The parties filed Motions To Review Taxation Of Costs.

For the most part Verex complains it was denied recovery of the cost of various original depositions (taken by Verex) and copies of depositions (taken by MCC), alleged to be necessary in preparation for trial but not actually used at trial. Verex seeks an additional $3,046.43 in costs disallowed by the Clerk. MCC opposes the allowance of any costs to Verex on the ground that MCC,

[5] In this case the Court was the "eighth" juror.

not Verex is the prevailing party herein. MCC seeks recognition as prevailing party on the ground that it achieved most of the relief originally sought when litigation began, notwithstanding an adverse jury decision on the bad faith issue.

An award of costs is essentially within the sound discretion of the Court, **Homestake Mining Co. v. Mid-Continent Exploration Co.**, 282 F.2d 787, 804 (10th Cir. 1960), but should be allowed pursuant to Rule 54(d), F.R.Civ.P., as a matter of course to the prevailing party unless the court otherwise directs. **True Temper Corp. v. CF&I Steel Corp.**, 601 F.2d 495, 509 (10th Cir.1979). A problem arises where there are two prevailing parties (or no prevailing parties).

MCC sued Verex on a large number of unpaid mortgage insurance claims. MCC alleges the claim payments were, in some instances, wrongfully refused and, in other instances, wrongfully delayed. Verex denied that any claim was wrongfully refused and that any delay in claim payment was the fault of MCC for improperly claimed amounts (e.g. for in house attorney fees). The parties then agreed on certain contract interpretation to resolve the disputes on the payment of claims. To this end a Partial Agreed Judgment was entered. Sums were paid to MCC by Verex thereafter. The issue of bad faith claim refusal or bad faith claim delay was not part of the parties agreement but rather tried to a jury. MCC lost. Verex won. Obviously Verex was the prevailing party on the bad faith issue. MCC claims prevailing party status on the earlier settlement.

A significant factor to the Court in exercising its discretion is that MCC was not claiming that Verex refused to pay *all* of the claims involved herein. It refused to pay some. It was late in paying many of the claims. Verex has offered justification for these refusals and tardiness. The Court believes many of the claims in question would have been paid, albeit late, without litigation having been instigated. Most of the evidence herein went to claims that were paid but in an untimely manner and with no (according to MCC) justification for untimeliness. The jury believed Verex' conduct did not amount to bad faith.

MCC now claims it is entitled to prevailing party status because it collected on the claims in issue. The Court concludes there in essence was no prevailing party at the settlement level. MCC received, belatedly, payment on claims. Verex paid, with interest thereon, claims owed by it. In the Court's view the issue of bad faith then became the only dispute from which a prevailing party could emerge as regards costs.

The Court, in its discretion, awards costs in favor of Verex and against MCC in the amount of $6,174.45, affirming the Clerk's taxation of costs on behalf of Verex in that amount. The Court DENIES Verex' Motion in increase costs in its favor. The Court DENIES MCC's Motion for costs as prevailing party under Rule 54(d), affirming the Clerk's denial of costs to MCC.

IT IS SO ORDERED this 16th day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

F.D.I.C., Plaintiff,	)	
vs.	)	Case No. 88-C-1341-B consolidated 88-C-1344-B
SHERIDAN PROPERTIES, INC., et al, Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, by 12-31-92, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 15 day of JUNE, 1992.

UNITED STATES DISTRICT JUDGE
THOMAS R. BRETT

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

F.D.I.C., Plaintiff,	)	
vs.	)	Case No. 88-C-1341-B consolidated 88-C-1344-B
SHERIDAN PROPERTIES, INC., et al, Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, by 12-31-92, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 15 day of JUNE, 1992.

UNITED STATES DISTRICT JUDGE
THOMAS R. BRETT

MCW/vlw

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALLSTATE INSURANCE COMPANY, a foreign corporation,

Plaintiff,

vs.

GARY SHERRILL; C.B. SHERRILL; and JEANNE SHERRILL,

Defendants.

No. 91-C-409-B

ORDER OF DISMISSAL

Upon the stipulation of the parties to the above styled and numbered cause of action, and for good cause shown, this action is dismissed with prejudice.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DANNY WEST,

Plaintiff,

v.

DREW DIAMOND, et al,

Defendants.

91-C-388-B

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed May 13, 1992 in which the Magistrate Judge recommended that this case be dismissed without prejudice.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that this case is dismissed without prejudice.

Dated this 15 day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONNIE D. DIAL,

Plaintiff,

v. 92-CC-456-B

RON CHAMPION, et al,

Defendants.

ORDER TO TRANSFER CAUSE

The Court having examined the Petition for Writ of Habeas Corpus which the Petitioner has filed finds as follows:

(1) That the Petitioner was convicted in Commanche County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma.

(2) That the Petitioner demands release from such custody and as grounds therefore alleges he is being deprived of his liberty in violation of rights under the Constitution of the United States.

(3) In the furtherance of justice this case should be transferred to the United States District Court for the Western District of Oklahoma.

IT IS THEREFORE ORDERED:

(1) Pursuant to the authority contained in 28 U.S.C. §2241(d) and in the exercise of discretion allocated to the Court, this cause is hereby transferred to the Untied States District Court for the Western District of Oklahoma for all further proceedings.

(2) The Clerk of this Court shall mail a copy of this Order to the Petitioner.

Dated this 15 day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA CENTRAL CREDIT UNION,

Plaintiff,

vs.

UNITED STATES OF AMERICA, ex rel., NATIONAL CREDIT UNION ADMINISTRATION,

Defendant.

Case No. 91-C-284-B

J U D G M E N T

In accord with the Order filed herein on June 15th, 1992, sustaining Defendant's Motion To Dismiss both Plaintiff's Fifth Amendment taking claim and Plaintiff's breach of fiduciary duty claim, sustaining Defendant's Motion For Partial Summary Judgment on the issue of its administrative decision to expand Communication Federal Credit Union's membership group, and denying Plaintiff's Motion for Partial Summary Judgment on the issue that the administrative decision was arbitrary, capricious and an abuse of discretion, judgment is hereby entered in favor of Defendant and against Plaintiff. Costs are awarded Defendant if timely applied for under Local Rule 6.

DATED this 15 day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICHARD OLSEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	92-C-462-B
	)	
RON CHAMPION,	)	
	)	
Defendant.	)	

ORDER TO TRANSFER CAUSE

The Court having examined the Petition for Writ of Habeas Corpus which the Petitioner has filed finds as follows:

(1) That the Petitioner was convicted in Muskogee County, Oklahoma, which is located within the territorial jurisdiction of the Eastern District of Oklahoma.

(2) That the Petitioner demands release from such custody and as grounds therefore alleges he is being deprived of his liberty in violation of rights under the Constitution of the United States.

(3) In the furtherance of justice this case should be transferred to the United States District Court for the Eastern District of Oklahoma.

IT IS THEREFORE ORDERED:

(1) Pursuant to the authority contained in 28 U.S.C. §2241(d) and in the exercise of discretion allocated to the Court, this cause is hereby transferred to the Untied States District Court for the Eastern District of Oklahoma for all further proceedings.

(2) The Clerk of this Court shall mail a copy of this Order to the Petitioner.

Dated this 15 day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRANSPORTATION INFORMATION SERVICES, INC., an Oklahoma Corporation, d/b/a DAC Services, Plaintiff, vs. MCI TELECOMMUNICATIONS CORPORATION, a Delaware Corporation, Defendant. MCI TELECOMMUNICATIONS CORPORATION, a Delaware Corporation, Third-Party Plaintiff, vs. PAUL H. HALE, Third-Party Defendant.	Case No. 90-C-426 E

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Defendant/Third-Party Plaintiff MCI Telecommunications Corporation and Third-Party Defendant Paul H. Hale, pursuant to Fed R. Civ. P. 41(a)(1)(ii), and hereby dismiss their Third-Party Complaint and Counterclaim against each other with prejudice. Plaintiff previously dismissed all its claims with prejudice. Therefore, all remaining parties who have appeared in this action have signed this dismissal.

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By: _____

James J. Proszek
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

-and-

John A. Fraser
MCI TELECOMMUNICATIONS CORPORATION
1133 19th Street N.W.
Washington, D.C.
(202) 887-2936

ATTORNEYS FOR DEFENDANTS

PATTON, BROWN

By: _____

Jack L. Brown
2200 Williams Center Tower II
Tulsa, Oklahoma 74103
(918) 592-3699

ATTORNEYS FOR THIRD PARTY DEFENDANT PAUL H. HALE

JUN 15 1992

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LANCE M. ATWELL; JANET M. ATWELL; COUNTY TREASURER, Ottawa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma,

Defendants.

FILED
JUN 15 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 91-C-103-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of June, 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; and the Defendants, Lance M. Atwell, Janet M. Atwell, County Treasurer, Ottawa County, Oklahoma, and Board of County Commissioners, Ottawa County, Oklahoma, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, County Treasurer, Ottawa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 20, 1991; and that Defendant, Board of County Commissioners, Ottawa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 21, 1991.

The Court further finds that the Defendants, Lance M. Atwell and Janet M. Atwell, were served by publishing notice of this action in the Miami News-Record, a newspaper of general circulation in Ottawa County, Oklahoma, once a week for six (6)

consecutive weeks beginning March 26, 1992, and continuing to April 30, 1992, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Lance M. Atwell and Janet M. Atwell, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Lance M. Atwell and Janet M. Atwell. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the

relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, Lance M. Atwell, Janet M. Atwell, County Treasurer, Ottawa County, Oklahoma, and Board of County Commissioners, Ottawa County, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Ottawa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> All that portion of the Northeast Quarter of the Southwest Quarter in Section 3, Township 28 North, Range 23 East of the Indian Base and Meridian, Ottawa County, Oklahoma, lying Northwest of the St. Louis, San Francisco Railroad, containing 7.5 acres, more or less.

The Court further finds that on January 20, 1989, the Defendants, Lance M. Atwell and Janet M. Atwell, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $24,000.00, payable in monthly installments, with interest thereon at the rate of 10 percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Lance M. Atwell and Janet M. Atwell, executed and delivered to the United States of America, acting on behalf of the Administrator of

Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated January 20, 1989, covering the above-described property. Said mortgage was recorded on January 23, 1989, in Book 472, Page 648, in the records of Ottawa County, Oklahoma.

The Court further finds that the Defendants, Lance M. Atwell and Janet M. Atwell, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Lance M. Atwell and Janet M. Atwell, are indebted to the Plaintiff in the principal sum of $23,912.51, plus interest at the rate of 10 percent per annum from November 1, 1989 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $223.40 ($22.80 fees for service of Summons and Complaint, $190.60 publication fees, $10.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, Lance M. Atwell, Janet M. Atwell, the County Treasurer, Ottawa County, Oklahoma, and the Board of County Commissioners, Ottawa County, Oklahoma, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Lance M. Atwell and Janet M. Atwell, in the principal sum of $23,912.51, plus interest at the rate of 10 percent per annum from November 1, 1989 until judgment, plus interest thereafter at the current legal rate of 4.26 percent per annum until paid,

plus the costs of this action in the amount of $223.40 ($22.80 fees for service of Summons and Complaint, $190.60 publication fees, $10.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Lance M. Atwell, Janet M. Atwell, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Lance M. Atwell Janet M. Atwell, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 91-C-103-B

PB/esr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA CENTRAL CREDIT UNION,

Plaintiff,

vs.

UNITED STATES OF AMERICA, ex rel., NATIONAL CREDIT UNION ADMINISTRATION,

Defendant.

Case No. 91-C-284-B

O R D E R

The Court has for decision Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and a Motion for Partial Summary Judgment. Also before the Court is Plaintiff's motion for Partial Summary Judgment. Plaintiff Oklahoma Central Credit Union ("OCCU") challenges a decision by the National Credit Union Administration ("NCUA"), to expand the membership group of Communication Federal Credit Union ("Communication") into a membership group that OCCU claims exclusively. OCCU seeks in excess of $3 million in damages arising from the overlap of the two credit unions.

In 1981, OCCU's membership field was expanded by the state to include all employees of Public Service Company of Oklahoma ("PSO"). At that time, the Local 1002 Credit Union ("Local 1002") was serving members of the International Brotherhood of Electrical Workers ("IBEW"), which included some PSO employees. When OCCU's membership field expanded, there became an overlap between OCCU and Local 1002, both serving those PSO employees who were members of

IBEW.

Local 1002 merged with Communication in 1985. Included in the merger was a provision whereby NCUA paid Communication a sum of money as the fair market value of a buyout provision for contingent losses attributable to an earlier merger conducted by Communication. NCUA also promised Communication it would consider expanding Communication's field of membership if the merger was successful. The merger allowed Communication to serve those persons previously served by Local 1002, including those PSO employees who were members of IBEW. The disputed issue is whether the merger agreement allows Communication to solicit membership from all PSO employees, as Communication believes, or whether Communication may only solicit membership from those PSO employees who also are members of IBEW, as OCCU believes.

OCCU complained to NCUA in 1987 that Communication had been soliciting members from all PSO employees, and requested that NCUA curtail the alleged violation of OCCU's field of membership. On February 9, 1989, NCUA directed Communication to accept no additional PSO employees unless those employees were members of IBEW. On June 17, 1988, OCCU advised NCUA that Communication continued to solicit membership from all PSO employees. On July 12, 1988, NCUA again advised Communication to abide by the definition of its field of membership as set out in the merger document.

However, sometime before December 21, 1988, NCUA reversed its decision and notified OCCU that an expansion of Communication's membership field to include all PSO employees was authorized and

approved. OCCU appealed, and the decision was affirmed in a closed meeting of the NCUA board on October 16, 1990.

OCCU alleges the decision to expand Communication's membership field was arbitrary and capricious and violates NCUA's membership policy. OCCU also alleges the expansion constitutes a taking of OCCU's property interest without due process, thereby violating the Fifth Amendment. OCCU contends the merger agreement, in which NCUA agreed to expand Communication's membership, breaches NCUA's fiduciary duty to OCCU. OCCU seeks in excess of $3 million in damages.

I.

The Court first considers Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction. Plaintiff alleges a taking of property without due process in violation of the Fifth Amendment. Defendant states there is no subject matter jurisdiction because the Tucker Act provides Claims Courts with exclusive jurisdiction over any claim against the United States that exceeds $10,000. Plaintiff states, however, that the Tucker Act does not apply to this case because jurisdiction is conferred under 12 U.S.C. §1789, which provides a "sue and be sued" clause pertaining to NCUA that sets no jurisdictional limit.

The Tucker Act provides jurisdiction in the United States Claims Court for any claim against the federal government to recover damages founded on the Constitution, a statute, a regulation or an express or implied contract. See 28 U.S.C.

§1491(a)(1). Hamilton Stores v. Hodel, 925 F.2d 1272 (10th Cir. 1991). The Little Tucker Act in §1346(a)(2) creates concurrent jurisdiction in the district courts for claims less than $10,000. Since this case involves a sum greater than $10,000, the issue here is whether the Tucker Act applies, thereby negating this court's subject matter jurisdiction.

In determining whether the Tucker Act applies to a suit against the federal government, "the proper inquiry is not whether the statute 'expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy,' but rather 'whether Congress has in the [statute] withdrawn the Tucker Act grant of jurisdiction to the [Claims Court] to hear a suit involving the [statute] founded ... upon the Constitution.'" Preseault v. I.C.C., 110 S.Ct. 914, 922 (1990), citing Regional Rail Reorganization Act Cases, 419 U.S. 102, 126 (1974).

In this case, Plaintiff OCCU contends that the Tucker Act does not apply because jurisdiction is conferred under 12 U.S.C. §1789, which provides a "sue and be sued" clause pertaining to NCUA. The statute states, in pertinent part, that the Board may:

> [S]ue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Board shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy.

In Preseault, the Supreme Court held that a claim regarding a Fifth Amendment taking is within the jurisdiction of the Claims

Court to hear and determine, because Tucker Act jurisdiction was not specifically withdrawn. The Court stated that "clear and unmistakable congressional intent" was necessary to withdraw Tucker Act coverage. Preseault, 110 S.Ct. at 923.

In this case, there is no mention of the Tucker Act in the statute or its legislative history, and there is no specific exemption in the Tucker Act for cases against the NCUA board. Therefore, there is no express withdrawal of Tucker Act jurisdiction that the Preseault court held to be necessary. In addition, the Court in Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), held that if the statute or amendment in question does not mention exemption from the Tucker Act, "the failure cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy." Ruckelshaus, 467 U.S. at 1019. Whether or not the United States so intended, any taking claim under the Fifth Amendment is one "founded ... upon the Constitution" and is "thus remediable under the Tucker Act." Id. at 1019, citing Railroad Reorganization, 419 U.S. at 126. If a plaintiff receives just compensation in the Claims Court, he has no taking claim in District Court. Therefore, "[t]aking claims against the federal government are premature until the property owner has availed itself of the process provided by the Tucker Act." Preseault, 110 S.Ct. at 921 (citations omitted).

Preseault, Ruckelshaus and the Railroad Reorganization Cases dealt with statutes that had no "sue and be sued" provision. Plaintiff argues that a "sue and be sued" provision could be

considered a waiver of the Tucker Act, even if the Tucker Act is not expressly mentioned in the statute. However, while there is a split among the circuits as to whether such provisions in other statutes effectively waive the Tucker Act's exclusive jurisdiction, the 10th Circuit has held that they do not.

Congress has integrated "sue and be sued" provisions within the overall scheme for allowing claims against the United States. Ascot Dinner Theatre v. Small Business Administration, 887 F.2d 1024, 1028 (10th Cir. 1989). "In this scheme, the Tucker Act ... provides the waiver of immunity and jurisdictional grant for the district courts and Court of Claims to entertain nontort actions arising from the Constitution." Id. at 1028. The Ascot court held that a "sue and be sued" provision[1] remained subject to the Federal Tort Claims Act, stating that the provision does not alter the FTCA as the exclusive remedy for actions sounding in tort. Therefore, following Ascot, OCCU's claim in this case under §1789 still would be subject to the Tucker Act, because both statutes are part of the congressional "scheme" to allow the federal government to be sued under certain circumstances.

In addition, the court in United States v. Adams, 634 F.2d 1261 (10th Cir. 1980), held the Tucker Act applicable, stating that the Department of Housing and Urban Development's "sue and be sued" provision applied only to HUD's actions in carrying out the functions under the statute chapter that contains the provision. Therefore, under Adams, OCCU's claim does not stand because it does

[1]In 15 U.S.C. §634(b)(1)

not allege a breach of the chapter that contains the provision; rather, OCCU's is a constitutional claim.

Nor can this be considered a federal question, thereby providing subject matter jurisdiction under §1331 as Plaintiff claims. To conclude that §1331 encompasses a taking claim would, in effect, nullify the Tucker Act. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978). Using §1331 as a basis for jurisdiction would give federal courts the power to hear claims against the federal government over $10,000, although the Little Tucker Act forbids it. "Giving effect to [the] argument would be implicitly repealing the Little Tucker Act." Broughton Lumber v. Yeutter, 939 F.2d 1547 (Fed.Cir. 1991).

Since there is no clear congressional intent to withdraw 12 U.S.C. §1789 from the Tucker Act, and no other statute Plaintiff mentions provides a basis of jurisdiction independent of the Tucker Act, this Court holds that the Tucker Act applies. This Court has no subject matter jurisdiction of Plaintiff's Fifth Amendment taking claim because Plaintiff has not shown that the Tucker Act remedy - exclusive suit in the Claims Court - has been waived. Therefore, Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby GRANTED as to that claim.

II.

An issue remains as to jurisdiction over Plaintiff's pendent claim, and Defendant's Motion to Dismiss for Failure to State a Claim for which Relief can be Granted, pursuant to Fed.R.Civ.P.

12(b)(6). Defendant seeks dismissal of Plaintiff OCCU's claim that NCUA breached a fiduciary duty to OCCU by taking OCCU's property interest, i.e., the membership pool in question. Defendant states, among other allegations, that such a claim is subject to the Federal Tort Claims Act, and that Plaintiff did not comply with regulations therein. However, this Court does not reach the issue of the applicability of FTCA here.

In determining whether jurisdiction can be retained over the claim, the Court must look at the motivating force behind the claim. If the reason for the claim is to obtain money from the federal government, it should go to Claims Court. The test for determining if a case belongs in Claims Court is whether "the prime objective" or "essential purpose" of the complaining party is to obtain money from the federal government. Eagle-Picher Industries v. United States, 901 F.2d 1530 (10th Cir. 1990).

The court in Heydt v. United States, 948 F.2d 672 (10th Cir. 1991), found that, although an independent basis of jurisdiction existed for a second claim, the right to recover on that claim directly derived from the issue that was sent to Claims Court due to the Tucker Act. Therefore, the additional claim also was sent to Claims Court, because its essential purpose also was to obtain money from the government. Heydt, 948 F.2d at 675.

The Heydt court turned to Hahn v. United States, 757 F.2d 581 (3rd Cir. 1985), to determine when claims can be split between Claims Court and District Court. The Hahn court held that District Court can retain jurisdiction over declaratory or injunctive

relief, if such "nonmonetary" relief "has significant prospective effect or considerable value apart from merely determining monetary liability of the government." Id. at 676, citing Hahn, 757 F.2d. at 591.

In this claim, Plaintiff OCCU seeks direct monetary compensation of $1 million - not declaratory or injunctive relief - for an alleged breach of fiduciary duty. Because the claim seeks monetary damages, and because it deals with the same transaction or occurrence as the first claim, this court determines that it lacks subject matter jurisdiction and dismissal is indicated. Plaintiff's Tucker Act remedy of suit in Claims Court is appropriate for both claims. Therefore, Defendant's Motion to Dismiss for Failure to State a Claim for which Relief can be Granted, on the issue of breach of fiduciary duty, is moot. Plaintiff's claim for breach of fiduciary duty should be and the same is hereby dismissed for lack of subject matter jurisdiction.

III.

This court retains jurisdiction over Plaintiff's claim for equitable relief, although the claim involves the same transaction or occurrence as those discussed above. In this claim, Plaintiff seeks equitable relief, which Claims Court would be unable to provide. Bowen v. Massachusetts, 108 S.Ct. 2722 (1988). "The Court of Claims has no power to grant equitable relief." Id. at 2737, citing Richardson v. Morris, 409 U.S. 464 (1973).

Plaintiff OCCU's complaint stated in Paragraph XXII that OCCU

sought $1 million in damages because of the alleged arbitrary and capricious act of expanding Communication's membership field. OCCU also prayed, in Paragraph XXIV, that the Court reverse NCUA's decision to allow expansion of the membership field, thereby returning the field to its original state. Plaintiff OCCU elaborated in its Response Brief, stating that the relief sought was disgorgement[2] of the profit realized by NCUA "from its sale of Plaintiff's right to serve PSO employees."

Both Plaintiff and Defendant agree the Administrative Procedure Act ("APA"), 5 U.S.C. §702, explicitly excludes claims for monetary damages. This Court agrees that straight monetary damages cannot be awarded under the APA, therefore Plaintiff would not prevail on a money damages issue, whether before Claims Court or District Court.

However, the Supreme Court's decision in Bowen allows monetary damages to be awarded if they are incidental to the equitable relief sought under the APA. In Bowen, the state was seeking equitable relief - reversal of an agency decision - that incidentally would provide money damages as part of that relief. While OCCU is precluded from seeking direct monetary damages under the APA, it still may seek equitable relief from District Court that incidentally involves monetary damages. OCCU seeks to have NCUA's decision reversed, and that decision may involve monetary damages.

The Tenth Circuit Heydt court agrees jurisdiction in this

[2]An equitable concept.

situation would be proper, stating that the court can retain jurisdiction even if the claims seeking declaratory relief may later form the basis for money judgments. If the court's granting of declaratory or injunctive relief would have the "concomitant effect of establishing a monetary judgment, [that effect] does not oust district court jurisdiction." Heydt, 948 F.2d at 676 and 677.

Although this Court retains jurisdiction over the equitable claim, it cannot hear the Tucker Act claims under pendent jurisdiction. McKay v. United States, 703 F.2d 464 (10th Cir. 1983). "Pendent jurisdiction has no application to a claim against the United States." Id. at 470, citing Lenoir v. Porter's Creek Watershed District, 586 F.2d 1081, 1087 (6th Cir. 1978).

IV.

The Court next considers Defendant's Motion for Partial Summary Judgment that NCUA's decision was not arbitrary, capricious or an abuse of discretion. Plaintiff in turn makes a cross-motion for Partial Summary Judgment that the decision was arbitrary, capricious and an abuse of discretion, alleging that NCUA violated its own Interpretive Ruling and Policy Statement.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Where there is an absence of material issues of fact, then the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986); Commercial Iron & Metal Co. v. Bache & Co., 478 F.2d 39, 41 (10th Cir. 1973); and Ando v. Great Western Sugar Co., 475 F.2d 531, 535 (10th Cir. 1973).

Judicial review of agency decisions is limited to determining whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." See 5 U.S.C. §706(2)(A). Review also is confined to the administrative record and the court may not receive new evidence. United States v. Bianchi & Co., 373 U.S. 709 (1963); Descheenie v. Bowen, 850 F.2d 624 (10th Cir. 1988). The agency's choice need not be the only possible choice, or even the best choice. It need only be "reasonable." American Mining Congress v. Marshall, 671 F.2d 1251 (10th Cir. 1982). According to Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983), Reversal is proper when:

> The agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

If, however, the agency findings are supported by substantial evidence,[3] and have a rational basis,[4] the findings stand.

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[3]Defined as "more than a mere scintilla". Descheenie, 850 F.2d at 627, citing Richardson v. Perales, 402 U.S. 389, 401 (1971).

[4]"The court's review function is exhausted where a rational basis for the agency action taken is found." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

"Evidence is not substantial if it is overwhelmed by other evidence ... or if it really constitutes not evidence but a mere conclusion." Descheenie, 805 F.2d at 628.

The NCUA policy that authorized NCUA to allow Communication's membership field expansion states:

> Policy requires that every effort be made to avoid an overlap situation. ... If a resolution of the problem is not reasonably forthcoming, and other circumstances warrant an overlap, then an overlap may be permitted. Circumstances to be considered are the nature of the problems, efforts to resolve the problems, financial impact on the credit union, the desires of the groups, and if applicable, the opinions of the state credit union supervisor and other interested parties.[5]

Plaintiff states summary judgment should be issued in its favor because NCUA did not abide by these policy regulations regarding membership field expansion. NCUA's first position was to order Communication to stop soliciting membership from all PSO employees. OCCU alleges the reversal of that decision breaches agency policy. A letter to OCCU from NCUA Region V Director J. Leonard Skiles (by Henry Garcia) stated NCUA reversed its decision because rescinding the agreement would be detrimental to PSO, because there was no evidence there would be a material impact to OCCU, and because the state banking supervisor did not object. (Defendant's Response Brief, Exhibit A).

OCCU states State Banking Commissioner Wayne Osborne rescinded his approval of the membership expansion because his approval "was

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[5]NCUA's Interpretive Ruling and Policy Statement 84-1, p. 7 (Attachment A of Defendant's Motion for Partial Summary Judgment).

obtained by NCUA via a false representation." Therefore the "false representation" provides one basis for reversal of the NCUA decision. However, it appears from the record that the NCUA board was aware of the rescission before it affirmed the decision to expand Communication's membership field. A memorandum to the NCUA board dated October 10, 1990, outlines Osborne's change of mind. Record, page 27 (Exhibit A of Plaintiff's Response Brief). Therefore, the board was aware of Osborne's new position and made its decision October 16, 1990, based on the new information, not on a mistaken belief that Osborne approved the expansion.

Plaintiff also alleges that the desires of PSO were not adequately gauged, stating that the sole evidence of PSO's wishes in the matter was a statement that PSO would quit providing payroll deductions for a credit union whose membership field is reduced. However, the minutes of the NCUA board meeting show that the board considered more factors than just payroll deductions. The transcript states that PSO indicated a willingness to continue to provide payroll deductions to both credit unions and "it saw no reason for any alteration of this activity." Record, p. 8. In addition, the transcript shows that Cynthia Mandizah, special assistant to the board who handled the OCCU appeal for NCUA, testified that PSO employees "are receiving credit union service from two credit unions with no apparent complaints. ... Any efforts to divide the employees into some equitable manner suitable to the two credit unions could cause potential problems for the member/employees." Record, p. 21.

Although Plaintiff states NCUA did not consider enough information when evaluating PSO's desires, the NCUA board's decision was reasonable. There was no evidence in the record before the board that indicated PSO objected to having two credit unions serve its employees. Plaintiff states that Communication solicited PSO, and PSO's acquiescence was based on the assumption that Communication was authorized to do so. That, however, does not change the fact that PSO did not object to the arrangement when given the opportunity to do so during the NCUA investigation. In fact, PSO indicated in a September 9, 1988, letter to NCUA that it "considered the services of (both credit unions) to be a desirable benefit of its employees." Record, p. 26. The letter also states that PSO "desires that services currently offered to all employees from both credit unions be allowed to continue; and that (PSO) not be put in a position whereby publicity and conflict demand re-evaluation of current payroll deduction policy." Defendant's Response Brief, Exhibit A, p. 18. The NCUA board stated it gave the greatest weight to the effect on PSO that a rescission would have.

Plaintiff also states the board's decision should be rescinded because the financial effect on OCCU will be significant, and that OCCU was dissuaded by NCUA from attempting to prove that impact at its appeal. Plaintiff points to a transcript of a meeting between OCCU and NCUA officials on January 29, 1988, in which NCUA official Gene Jackson stated that NCUA had never asked OCCU to gauge the financial impact of the membership field expansion. Plaintiff's Exhibit D, p. 8.

In that same meeting, however, OCCU marketing director Joyce Maxwell, when asked about financial impact, stated, "I don't have dollars, but we know that again PSO is our largest company. This is very important to us." She also stated that "we don't know and so far we've not gotten numbers together" regarding whether OCCU had lost members to Communication.

In addition, Ms. Mandizah testified at the board hearing that financial impact information was requested from OCCU, but was not provided. "During the [settlement discussions] in 1990, both credit unions indicated that the fields of membership as they now exist are okay, that there would not be a material impact if there was any type of alteration of the fields of membership." Record, p. 7. The board also looked at the financial health of both credit unions. Record, p. 13. Since there was no specific information available regarding financial impact of the expansion, the board considered the general financial health of both credit unions. Record, p. 13.

Neither credit union provided information on the number of PSO employees that were members of each credit union. Ms. Mandizah testified that "we tried both in writing and verbally with these two credit unions to get specific data on servicing, and neither credit union produced it for us." Record, p. 16. In addition, the credit unions adhere to a "once a member, always a member" policy, so rescinding the membership expansion would have no immediate effect on the situation. Record, p. 16.

Even assuming Gene Jackson's statement is true and NCUA did

not ask for any financial impact information, Plaintiff has not shown that it was prohibited from presenting such information to the board. OCCU had an opportunity to appeal to the board, presenting the best case possible, and presumably that includes financial impact information. Nowhere in the materials OCCU submitted to the board is financial impact information (Defendant's Response Brief, Exhibit A). The NCUA board was told OCCU claimed there would be a material effect, and it was entitled to weigh that information against NCUA officials' claims that there would be no material financial effect. There is no material evidence in the record that shows the NCUA board's decision to affirm expansion of Communication's membership field was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The decision is reasonable in light of the agency record.[6] There is no genuine issue as to any material fact, therefore partial summary judgment is hereby GRANTED for Defendant United States of America, ex. rel. National Credit Union Administration and against Plaintiff OCCU. Plaintiff OCCU's motion for partial summary judgment is hereby DENIED.

In summary, Defendant's Motion to Dismiss Plaintiff's Fifth Amendment taking claim is GRANTED for lack of subject matter jurisdiction. Defendant's Motion to Dismiss Plaintiff's breach of

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[6]The data that OCCU now provides regarding the amount spent to redesign the parking lot and add automatic teller machines was not provided in the board record and therefore cannot be considered by this court in its review. Judicial review is confined to the administrative record. United States v. Bianchi & Co., 373 U.S. 709 (1963); Descheenie v. Bowen, 850 F.2d 624 (10th Cir. 1988).

fiduciary duty claim also is GRANTED for lack of subject matter jurisdiction. Defendant's motion for Partial Summary Judgment on the issue of its administrative decision to expand Communication's membership is hereby GRANTED. Plaintiff's Motion for Partial Summary Judgment on the issue that the administrative decision was arbitrary, capricious and an abuse of discretion is hereby DENIED.

IT IS SO ORDERED, this 15-TH day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES L. EVANS,

Petitioner,

v.

RON CHAMPION, et al,

Respondents.

92-C-505-B

ORDER

The Court having examined petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 finds as follows:

(1) That the petitioner is contesting his conviction in the Oklahoma County District Court, which is located within the territorial jurisdiction of the Western District of Oklahoma.

(2) That the petitioner demands his release from the custody imposed as a result of that conviction and as grounds therefore alleges he is being deprived of his liberty in violation of rights under the Constitution of the United States.

(3) In the furtherance of justice this case should be transferred to the United States District Court for the Western District of Oklahoma.

IT IS THEREFORE ORDERED:

(1) Pursuant to the authority contained in 28 U.S.C. § 2241(d) and in the exercise of discretion allocated to the Court, this cause is hereby transferred to the United States District Court for the Western District of Oklahoma for all further proceedings.[1]

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[1] Title 28 U.S.C. § 2241(d) states: "Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court

(2) The Clerk of this Court shall mail a copy of this Order to the petitioner.

Dated this 15 day of June, 1992.

THOMAS. R. BRETT
UNITED STATES DISTRICT JUDGE

was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such application is filed in the exercise of discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination."

DATE JUN 15 1992

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL L. DANNELS; KARLA D. DANNELS; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	FILED JUN 15 1992 Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA CIVIL ACTION NO. 92-C-043-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of June, 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear not, having previously disclaimed any right, title or interest in the subject property; and the Defendants, Michael L. Dannels and Karla D. Dannels, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that Defendant, Michael L. Dannels, acknowledged receipt of Summons and Complaint on February 1, 1992; that Defendant, Karla D. Dannels, acknowledged receipt of Summons and Complaint on February 1, 1992; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 22, 1992; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma,

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT

acknowledged receipt of Summons and Complaint on January 22, 1992.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on February 11, 1992, disclaiming any right, title or interest in the subject property; that the Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on February 11, 1992, disclaiming any right, title or interest in the subject property; and that the Defendants, Michael L. Dannels and Karla D. Dannels, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on February 28, 1992, Michael Lee Dannels a/k/a Mike L. Dannels and Karla Dean Dannels filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-00642-W. On June 2, 1992, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lots One (1), thru Nine (9), Inclusive, Block Sixteen (16), TOWN OF TURLEY, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on June 7, 1979, the Defendants, Michael L. Dannels and Karla D. Dannels, executed and delivered to American Mortgage and Investment Company, their mortgage note in the amount of $29,500.00, payable in monthly installments, with interest thereon at the rate of 10 percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Michael L. Dannels and Karla D. Dannels, executed and delivered to American Mortgage and Investment Company, a mortgage dated June 7, 1979, covering the above-described property. Said mortgage was recorded on July 12, 1979, in Book 4405, Page 2186, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 9, 1980, American Mortgage and Investment Company, executed and delivered to the United States of America acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, an Assignment of Real Estate Mortgage covering the above-described property. Said mortgage was recorded on October 2, 1980 in Book 4501, Page 1043 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Michael L. Dannels and Karla D. Dannels, made default under the terms of the aforesaid note and mortgage by reason of their failure to make

the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Michael L. Dannels and Karla D. Dannels, are indebted to the Plaintiff in the principal sum of $26,199.45, plus interest at the rate of 10 percent per annum from November 1, 1990 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $8.40 for service of Summons and Complaint.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, Michael L. Dannels and Karla D. Dannels, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendants, Michael L. Dannels and Karla D. Dannels, in the principal sum of $26,199.45, plus interest at the rate of 10 percent per annum from November 1, 1990 until judgment, plus interest thereafter at the current legal rate of 4.26 percent per annum until paid, plus the costs of this action in the amount of $8.40 for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Michael L. Dannels, Karla D. Dannels, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any

right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 92-C-043-B

PB/esr

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK EDWARD BROWN,

Plaintiff,

v.

STANLEY GLANZ, et al,

Defendants.

91-C-548-E

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed May 15, 1992, in which the Magistrate Judge recommended that Defendant Stanley Glanz's Motion to Dismiss be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

It is therefore Ordered that Defendant Stanley Glanz's Motion to Dismiss is granted.

Dated this 12th day of June, 1992.

James O. Ellison

JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

entered

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SWEDE INDUSTRIES, INC.,

Plaintiff,

vs.

ZEBCO CORPORATION, a Delaware Corporation, and the BRUNSWICK CORPORATION, a Delaware Corporation,

Defendants.

Case No. 90-C-596-B

O R D E R

This matter comes on for consideration of Defendants' Appeal from the Magistrate Judge's Order of February 10, 1992, filed February 11, 1992, Denying Defendants' Motion To Bifurcate and Granting Plaintiff's Motion To Compel. Defendants, Zebco Corporation and Brunswick Corporation (Zebco), appeal only the denial of their Motion To Bifurcate.

In their appeal Defendants complain the Magistrate Judge denied bifurcation based on rule 42(b), F.R.CIV.P., without reference to the statutory provision, 28 U.S.C. § 1292(c)(2) which latter section allegedly expressly recognizes bifurcation of damages in patent cases and the practical reasons therefor. Defendants argue that patent infringement accountings, such as may occur in the present case, are complex proceedings that conceivably consume several times the amount of trial time involved in determining the liability issues.

Defendants further argue that because Plaintiff has charged infringement of two patents, one an ornamental design [appearance] patent and one a utility [mechanical] patent, the damages, if any, differ, requiring two sets of damage evidence. Defendants aver that, in the case of design patents, the owner of an infringed design patent may recover the infringer's profits while in the case of a utility patent the damages include only the patent owner's lost profits but do not include the infringer's profits. Therefore, the argument goes, if infringement of the utility patent is found but not of the design patent, determination of the defendants' profits would not be necessary in the accounting trial, saving a substantial amount of trial time.

Plaintiff, Swede Industries, Inc. (Swede), counters that bifurcation at this stage of the case[1] would be counter-productive and particularly onerous as to Plaintiff because of the disparity of size and wealth of the litigants.[2] Plaintiff further argues that, because Zebco has counterclaimed for actual and punitive damages for causes of actions in libel, unfair competition, Lanham Act and Oklahoma Deceptive Trade Practices Act, requiring a showing of special harm of a pecuniary nature, "Zebco will have to produce the same financial documents which Zebco has withheld from discovery based on its request for a bifurcation of the patent liability and damages issues in this lawsuit."

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[1] The case is set for trial October 26, 1992.

[2] Swede Industries alleges it "is a small company, new to the marketplace, selling its first fishing reel within the marketplace -- the patented product."

Plaintiff also argues that Zebco's attempt to bifurcate would preclude evidence as to willful infringement alleged by Swede as to both patents. Plaintiff avers this issue relates to both liability and increased damages under the patent laws, citing 35 U.S.C. §§ 284 and 285.

Neither party suggests a bifurcation ruling is not within the pale of a Magistrate Judge's pretrial jurisdiction. See, generally, 28 U.S.C. § 636. The proper standard of review for appeal of a Magistrate Judge's Order is "clearly erroneous or contrary to law". § 636(b)(1)(A):

> " * * * A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law."

The Court recognizes that 28 U.S.C. § 1292 (c)(2), cited by Zebco, acknowledges the reality of bifurcation of damages, where appropriate. However, nothing therein dictates bifurcation nor disturbs the general view that bifurcation is a matter to be decided by the court from an informed exercise of discretion on a case-by-case analysis. **Smith v. Alyeska Pipeline Serv.Co.**, 538 F.Supp. 977, 982 (D.Del.1982), aff'd. 758 F.2d 668, *cert. den.* 471 U.S. 1066 (1985).

After careful review of the parties' pleadings, the Court concludes the Magistrate Judge's Order is not clearly erroneous or contrary to law. Defendants' Appeal from same should be and the same is hereby DENIED.

IT IS SO ORDERED this 15 day of June, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., Plaintiff/Counterdefendant, vs. LOS ANGELES RENTAL AND LEASING, INC., ABCO AUTO FLEET, INC., TED L. ANDERSON, P. THOMAS ANDERSON, MARVIN J. ANDERSON, Defendants/Counterplaintiffs.	Case No. 91-C-482-B

ORDER GRANTING THRIFTY'S
MOTION FOR SUMMARY JUDGMENT
ON DEFENDANTS' COUNTERCLAIMS

This Court has considered the motion of the Plaintiff/Counterdefendant, Thrifty Rent-A-Car System, Inc. ("Thrifty") for summary judgment on all counts of the counterclaim filed against it by defendants/counterplaintiffs Los Angeles Rental and Leasing, Inc., ABCO Auto Fleet, Inc., Ted L. Anderson, P. Thomas Anderson and Marvin J. Anderson ("Defendants"). No genuine issue as to any fact material to Thrifty's motion exists, the undisputed facts do not support the counterclaim and Thrifty is entitled to judgment as a matter of law on each count of the counterclaim.

Accordingly, it is hereby ORDERED and ADJUDGED that judgment is granted and entered in favor of Thrifty Rent-A-Car System,

Inc., and against the Defendants and each of them on each count of Defendants' Counterclaim.

It is further hereby ORDERED and ADJUDGED that there is no just reason for delay in entering final judgment on the counterclaim and, therefore, pursuant to Rule 54(b), Fed.R.Civ.P., the judgment entered hereby shall be a final judgment on the counterclaim in favor of Thrifty Rent-A-Car System, Inc. and against the Defendants and each of them.

Dated: June 12, 1992

United States District Judge

APPROVED:

Richard A. Paschal
ATTORNEY FOR PLAINTIFF

ATTORNEY FOR DEFENDANTS

LC59299

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOE L. WHITE,

Plaintiff,

vs.

AMERICAN AIRLINES, INC.,

Defendant.

Case No. 82-C-755-S

ORDER

The Court has for consideration the Stipulation of Dismissal with Prejudice filed by the Plaintiff, Joe L. White, and the Defendant, American Airlines, Inc. The Court, being advised in the premises, FINDS that this action should be dismissed with prejudice.

IT IS THEREFORE ORDERED that this action be, and the same is, dismissed with prejudice.

DATED this 11th day of June, 1992.

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BENJAMIN BREWER,

Petitioner,

v.

DAN L. REYNOLDS, Warden, Oklahoma State Penitentiary, McAlester, Oklahoma,

Respondent.

No. 92-C-487-B

ORDER

Before the Court is the Petitioner's Application for Stay of Execution. Upon petitioner's request pursuant to 28 U.S.C. §2254 to review his petition for habeas corpus and the state having no objection to the stay pending the Court's review, the Court grants the Petitioner's Application for Stay of Execution.

IT IS HEREBY ORDERED that the execution be STAYED until further order of this Court.

DATED this 12th day of June, 1990.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JUN 12 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BENJAMIN BREWER,

Petitioner,

v.

DAN L. REYNOLDS, Warden, Oklahoma State Penitentiary, McAlester, Oklahoma,

Respondent.

No. 92-C-487-B

FILED
JUN 12 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is the Petitioner's Application for Stay of Execution. Upon petitioner's request pursuant to 28 U.S.C. §2254 to review his petition for habeas corpus and the state having no objection to the stay pending the Court's review, the Court grants the Petitioner's Application for Stay of Execution.

IT IS HEREBY ORDERED that the execution be STAYED until further order of this Court.

DATED this 12th day of June, 1990.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. THREE PARCELS OF REAL PROPERTY COMPRISING A 10.0 ACRE TRACT IN THE S/2 SE/4 SW/4 OF SECTION 14, TOWNSHIP 22 NORTH, RANGE 11 EAST, OSAGE COUNTY, OKLAHOMA, AND ALL BUILDINGS, APPURTENANCES, IMPROVEMENTS, AND CONTENTS THEREON, A PORTION OF WHICH IS COMMONLY KNOWN AS BIG BUCK'S BAR-B-QUE, Defendants.	CIVIL ACTION NO. 92-C-036-B

NOTICE OF DISMISSAL

Plaintiff, the United States of America, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Catherine J. Depew, Assistant United States Attorney, hereby gives notice that, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the above-styled action is dismissed without prejudice and without costs.

DATED this 11th day of June, 1992.

Respectfully submitted,

TONY M. GRAHAM
United States Attorney

CATHERINE J. DEPEW, OBA #3836
Assistant United States Attorney
3900 United States Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103
(918) 581-7463

CJD/ch

N:\UDD\CHOOK\FC\POWELL\BIGBUCKS\02172

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS, AND ASSIGNS OF HELEN L. AMES, DECEASED; LINDA GABBARD; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	CIVIL ACTION NO. 91-C-331-C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10 day of June, 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear not, having previously filed their Answers disclaiming any right, title, or interest in the subject property; and the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Helen L. Ames, Deceased, and Linda Gabbard, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Linda Gabbard, acknowledged receipt of Summons and Complaint on May 20, 1991; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on May 21, 1991.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Helen L. Ames, Deceased, were served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning March 13, 1992, and continuing to April 17, 1992, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c) and 84 O.S. § 260. Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Helen L. Ames, Deceased, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Helen L. Ames, Deceased. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Farmers Home Administration, and

its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on August 2, 1991, disclaiming any right, title or interest in the subject property; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on June 19, 1991, disclaiming any right, title or interest in the subject property; and that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Helen L. Ames, Deceased, and Linda Gabbard, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seventeen (17), Block Two (2), ROLLING MEADOWS, an Addition to the Town of Glenpool, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of the Defendant, Helen L. Ames, and of judicially determining the heirs of Helen L. Ames.

The Court further finds that Helen L. Ames, a single person, now deceased, became the record owner of the real property involved in this action by virtue of a Warranty Deed dated January 28, 1981, in Book 7523, Page 1166.

The Court further finds that Helen L. Ames died on January 29, 1989, while seized and possessed of the real property being foreclosed. The Certificate of Death No. 01911 was issued by the Oklahoma State Department of Health certifying Helen L. Ames' death.

The Court further finds that on January 28, 1981, Helen L. Ames, now deceased, executed and delivered to the United States of America, acting through the Farmers Home Administration, her promissory note in the amount of $35,000.00, payable in monthly installments, with interest thereon at the rate of 12 percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Helen L. Ames, now deceased, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated

January 28, 1981, covering the above-described property. Said mortgage was recorded on January 28, 1981, in Book 4523, Page 1168, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 14, 1981, Helen L. Ames executed and delivered to the United States of America, acting through Farmers Home Administration, an Interest Credit Agreement, pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on March 3, 1983, Helen L. Ames executed and delivered to the United States of America, acting through Farmers Home Administration, an Interest Credit Agreement, pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on March 6, 1984, Helen L. Ames executed and delivered to the United States of America, acting through Farmers Home Administration, an Interest Credit Agreement, pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on February 12, 1985, Helen L. Ames executed and delivered to the United States of America, acting through Farmers Home Administration, an Interest Credit Agreement, pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on May 9, 1985, Helen L. Ames executed and delivered to the United States of America, acting through Farmers Home Administration, an Interest Credit

Agreement, pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on March 11, 1986, Helen L. Ames executed and delivered to the United States of America, acting through Farmers Home Administration, an Interest Credit Agreement, pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on October 16, 1986, Helen L. Ames executed and delivered to the United States of America, acting through Farmers Home Administration, an Interest Credit Agreement, pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on August 13, 1987, Helen L. Ames executed and delivered to the United States of America, acting through Farmers Home Administration, an Interest Credit Agreement, pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on August 28, 1988, Helen L. Ames executed and delivered to the United States of America, acting through Farmers Home Administration, an Interest Credit Agreement, pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that Helen L. Ames died intestate on January 29, 1989, and the subject property vested in The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Helen L. Ames.

The Court further finds that Helen L. Ames, now deceased, made default under the terms of the aforesaid note, mortgage, and interest credit agreements by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Helen L. Ames, now deceased, is indebted to the Plaintiff in the principal sum of $29,954.60, plus accrued interest in the amount of $4,007.56 as of October 2, 1990, plus interest accruing thereafter at the rate of twelve percent (12.00%) per annum, or $9.8481 per day, until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of $27,955.24, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of $303.65 for publication fees.

The Court further finds that the Plaintiff is entitled to a judicial determination of the death of Helen L. Ames and to a judicial determination of the heirs of Helen L. Ames.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Helen L. Ames, Deceased, and Linda Gabbard, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem in the principal sum of $29,954.60, plus accrued interest in the amount of $4,007.56 as of October 2, 1990, plus interest accruing thereafter at the rate of twelve percent (12.00%) per annum, or $9.8481 per day, until judgment, plus interest thereafter at the current legal rate of 4.26 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of $27,955.24, plus interest on that sum at the current legal rate of 4.26 percent per annum until paid, plus the costs of this action in the amount of $303.65 for publication fees, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of Helen L. Ames be and the same hereby is judicially determined to have occurred on January 29, 1989 in the City of Glenpool, Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff mailed a copy of the Order For Service by Publication with a printed copy of the Publisher's Affidavit, to Helen Gabbard, the only known heir of Helen L. Ames, Deceased, and the Court approves the Certificate of Publication and Mailing filed by Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners,

Tulsa County, Oklahoma, and Linda Gabbard have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 91-C-331-C

PP/esr

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BOBBY JOE KING,

Plaintiff,

v.

B.R. BEASLEY,

Defendant.

91-C-459-C

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed May 13, 1992 in which the Magistrate Judge recommended that this case be dismissed without prejudice.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that this case is dismissed without prejudice.

Dated this 10 day of June, 1992.

H. DALE COOK,
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BUCHBINDER & ELEGANT, P.A., Receiver of Aikendale Associates, A California limited partnership, ROBERT MARLIN and JACK D. BURSTEIN,

Plaintiffs,

V.

No. 89-C-843-E

SOONER FEDERAL SAVINGS AND LOAN ASSOCIATION, W.R. HAGSTROM, EDWARD L. JACOBY, DELOITTE, HASKINS & SELLS, PAINEWEBBER INCORPORATED, and STEPHEN ALLEN,

Defendants.

O R D E R

The Court has for consideration, first, the Joint Motion to Enlarge Order Dismissing Amended Complaint filed by Defendants Edward L. Jacoby and W. R. Hagstrom, and second, the Plaintiffs' Motion to Clarify, Alter or Amend Order. Both motions concern the same Order.

After perusal of the record and the relevant pleadings the Court finds that both motions have merit. Consequently, the Court's Order of May 15, 1992, will be enlarged and clarified.

IT IS THEREFORE ORDERED that Plaintiffs' Amended Complaint is being dismissed as to Deloitte, Haskins & Sells, as well as to Edward L. Jacoby and W. R. Hagstrom.

BUT IT IS ALSO ORDERED that the Plaintiffs will have twenty days within which to file a new amended complaint complying with

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Rule 9(b). As a corollary, all pending motions between the parties mentioned in this order are moot.

SO ORDERED on the 10th day of June 1992.

CHIEF JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT